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Supreme Court of the United States

October Term, 1959

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No. 824

WASSIL A. KRESHIK, as Dean of Saint Nicholas Cathedral, and BORIS VIK, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church and as Exarch of the Patriarch of Moscow and All Russia, and DIMITRIUS JOHN DIACHENKO, as substitute for defendant, BORIS VIK, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church and as Exarch of the Patriarch of Moscow and All Russia,

Petitioners,

vs.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PHILIP ADLER,
Attorney for Petitioner,
Office & P. O. Address,
8 West 40th Street,
New York 18, New York,

PHILIP ADLER,
EUGENE GRESSMAN,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1960

No.

WASSIL A. KRESHIK, as Dean of Saint Nicholas Cathedral, and BORIS VIK, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church and as Exarch of the Patriarch of Moscow and All Russia, and DIMITRIUS JOHN DIACHENKO, as substitute for defendant, BORIS VIK, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church and as Exarch of the Patriarch of Moscow and All Russia,

Petitioners,

vs.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Wassil A. Kreshik, as Dean of Saint Nicholas Cathedral, and Boris Vik, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church and as Exarch of the Patriarch of Moscow and All Russia, and Dimitrius John Diachenko, as substitute for petitioner Boris Vik, as Archbishop, etc., respectfully pray for a Writ of Certiorari to the Court of Appeals of the State of New York

to review the judgment and decision of the said Court, announced on December 30, 1959, which reversed a judgment of the Appellate Division, First Department, of the Supreme Court of the State of New York in favor of petitioners and awarded judgment directing the ejectment of petitioners from Saint Nicholas Cathedral of the Russian Orthodox Church. The remittitur of the Court of Appeals is annexed hereto as Appendix C. Respondent has not yet entered judgment on the remittitur in the New York County Clerk's office.

Opinions Below and Prior Opinions

In 302 N. Y. 1 the Court of Appeals, by a vote of 4 to 3, reversing the lower courts, directed the ouster from St. Nicholas Cathedral of the bishop appointed by the Patriarch. In 344 U. S. 94 this Court, by a vote of 8 to 1, reversed that decision. On remand the Court of Appeals, by a vote of 4 to 2, ordered a new trial (306 N. Y. 38). In 346 U. S. 893 (*Ex parte Kedroff*) this Court, by a vote of 7 to 2, denied petitioners' motion for leave to file a petition for a Writ of Mandamus against the judges of the Court of Appeals. On the new trial the trial court gave judgment for petitioners in an opinion reported in 9 Misc. (2d) 1069 and printed at pp. 1624-37 of the record below. The Appellate Division unanimously affirmed without opinion (6 A. D. 2nd 866). In 7 N. Y. 2d 191 the Court of Appeals reversed by a vote of 4 to 3 and directed the ouster of the Patriarchal bishop.

The majority and dissenting opinions in 7 N. Y. 2d 191 are annexed hereto as Appendix A. This majority opinion is in reality a projection or extension of that reported in 306 N. Y. 38. Both should be read together and for that reason the majority and dissenting opinions in 306 N. Y. 38 are annexed hereto for the convenience of the Court as Appendix B.

Jurisdiction

The jurisdiction of this Court rests on 28 U. S. C. Sec. 1257 (3). The decision of the Court of Appeals was rendered on December 30, 1959. A timely motion by petitioners for re-argument of this decision in that Court was denied on February 24th, 1960.

Questions Presented

(1) Are the decisions of the Court of Appeals reported in 7 N. Y. 2d 191 and in 306 N. Y. 38 in contravention of (a) the decision of this Court in this very case reported in 344 U. S. 94, (b) *Watson* v. *Jones* (13 Wall. 679) and (c) the guarantees of religious liberty of the First and Fourteenth Amendments to the United States Constitution?

(2) Does the judgment of the Court of Appeals directing the ouster from Saint Nicholas Cathedral of the bishop appointed by the Patriarch deprive the said bishop and the Patriarch of a property right without due process of law in contravention of the Fourteenth Amendment?

(3) Does the decision of the Court of Appeals reported in 7 N. Y. 2d 191 deprive petitioners of their legal rights without due process of law and deny them the equal protection of the laws in contravention of the Fourteenth Amendment to the United States Constitution?

The Manner in Which the Federal Questions Are Raised

The federal questions raised in this case were asserted in the amended answer of petitioners which alleged by way of affirmative defenses that the new trial ordered in 306 N. Y. 38 and the relief sought by respondent and the ejectment from Saint Nicholas Cathedral of petitioners would (a) contravene the decision of this Court in 344 U. S. 94 and *Watson* v. *Jones;* (b) be repugnant to the guarantees

of religious liberty in the First and Fourteenth Amendment of the United States Constitution; and (c) deprive petitioners of property without due process of law in contravention of the Fourteenth Amendment to said Constitution (pp. 8-14 of record below). These defenses were asserted in support of petitioners' motion to dismiss the complaint at the end of respondent's case (pp. 662-3 of record below) and at the end of the case (p. 996 of record below) and were advanced in the petitioners' briefs in the Appellate Division and the Court of Appeals and on the oral argument by their counsel before these courts and are in part discussed in the opinions below.

The question whether the decision below denied petitioners the equal protection of the laws in contravention of the Fourteenth Amendment arose in the case for the first time from the last decision of the majority in the court below (7 N. Y. 2d 191) and was raised by petitioners in their motion in that Court for re-argument of said decision. (See pp. 23-5 of their motion for re-argument, a certified copy of which is submitted herewith).

The Constitutional Provisions Involved

The Constitutional provisions involved are the First and Fourteenth Amendments to the United States Constitution. Their text is given in Appendix D attached hereto.

Statement of the Case

The Prior Decisions of the Court of Appeals in this Case

The extent to which the Court of Appeals violated the prior decision of this Court in this case (344 U. S. 94), *Watson* v. *Jones*, 13 Wall. 679, and the First and Fourteenth Amendments to the United States Constitution can more readily be seen by an analysis of the three decisions

which the majority below rendered on the three separate occasions when this case came before that Court.

There were two trials of the action. At the first trial, the lower courts ruled in favor of the patriarchally appointed bishop on the authority of *Watson* v. *Jones*.

The Court of Appeals reversed by a vote of four to three (302 N. Y. 1). Judge Conway, speaking for the majority, held that it was error to apply *Watson* v. *Jones* to the case and formulated the unprecedented theory whereby he cast the bishop in the role of a "trustee"[1] of the Cathedral and then said that if it be found that the Patriarchate is not "free", is an "agency" of the Soviet government, is a "tool" of the Kremlin, the legislature could by command, or the courts, by virtue of their discretionary supervision over the conduct of trustees, could, in their discretion,[2] eject from the Cathedral the appointed "trustee bishop" and install therein a more "faithful trustee"; and since he discerned this "determinative finding" in Article 5-C of the Religious Corporations Law of the State, he ordered the ouster of the patriarchal bishop and his replacement by the official locally elected by a group of churches which in 1924 had organized themselves "temporarily" as an "administratively autonomous metropolitan district."

Judge Desmond, (Loughran, C. J., and Fuld, J., concurring), strongly dissented on the ground that the judgment

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[1] In no circumstances may a bishop be treated as a "trustee". The majority, by the simple device of misnaming a bishop a trustee, strip him of his ecclesiastical rights and bring him, in the role of "trustee", within the orbit of the civil power from which, as his status as bishop, he is immune.

[2] If this action in ejectment, which is one at law, had been tried by a jury, as it could have been, how would "discretion" have been exercised? By the jury? The "trustee" and "discretion" theories are basically unsound *ad hoc* inventions of the majority. So is their domination theory which is a device to nullify the canon law of churches.

of ouster was unprecedented, unconstitutional and violated *Watson* v. *Jones*. "No other decision reaching such a result can be found in the books", said Judge Desmond (*id.* p. 36).

Answering the contention that the Patriarch is a mere fellow traveler on the Communist road, serving not God, but the Soviet Caesar, that the Patriarchate "is a mere agency or instrumentality of the Soviet government" (p. 37), Judge Desmond said that even if this were true, "we still could not, as a court, strike down the appointment [of the bishop] or refuse to give it credit. The Patriarch, like all men, must account for his stewardship, but not to the New York courts" (*id.*, p. 38).

In 344 U. S. 94 this Court, in an opinion by Justice Reed, reversed the majority on the ground that the present Patriarch was duly elected the head of the Russian Church at an "admittedly canonical sobor", that he had the canonical right to appoint the archbishop, that such appointee had the canonical right to use and occupy the Cathedral, that such right of appointment and use had never been relinquished or lost and were "strictly a matter of ecclesiastical government" and "an exercise of religion", which was protected by the Constitution from "state interference", and that the ouster of the appointed, i.e., the canonical archbishop, from the Cathedral; and the statute which authorized it, were invalid, because they prohibited the free exercise of religion in contravention of the First Amendment and *Watson* v. *Jones*.

Justice Reed then took specific note of the justification for the ouster tendered by Judge Conway, viz., his "trustee" theory (*id.* at 106-107, 117-18), the "Soviet attitude towards things religious", the "changed situation of the Patriarchate in Russia" (*id.* 117), the "control" over the Patriarchate "exercised" by the Soviet government (*id.* at 108-9), and the legislative finding that the Patriarchate was no longer "a true religious body" but had become an

"agency", a "tool" of the Soviet government (*id.* at 107). But he held that this did not cancel the constitutional immunity of the Patriarchal Church, did not justify the ouster of the appointed archbishop and that the statute could not "validate action which the Constitution prohibits" (*id.* at 107).

In his concurring opinion, in which Justices Black and Douglas concurred, Justice Frankfurter said that the civil power could not substitute its judgment as to the canonical status of the Patriarch over that of the Orthodox world and deny him his ecclesiastic rights attending that status (*id.* at 125). Justice Jackson dissented on technical grounds (*id.* at 121, 126).

Accordingly, this Court reversed the decree of ouster and, in conformity with its usual procedure, remanded the case to the state court "for such further action as it may deem proper and not in contravention of this (Justice Reed's) opinion" (*id.* at 121).

On remand the same majority of the Court of Appeals, who had been reversed by this Court, reaffirmed the basic views of their first decision and, again speaking through Judge Conway (306 N. Y. 38), held that Justice Reed did no more than declare the statute unconstitutional and since Justice Reed, as they said, did not "in terms" (p. 40a, *infra*) that is, in so many words, rule out their "common law discretion theory", the appointed bishop could be ousted in the *discretion* of a trial judge, if he finds that the Patriarchate is subject to the "domination" and is an "agency" of the Soviet state, even though he could not do so upon a like finding made by the statute.

Judge Conway criticized Justice Reed's opinion as based on an "assumption" contrary to fact (p. 39a, *infra*) and brushed aside as "a passing comment, unnecessary to the actual decision of the court upon the validity of Article 5-C" (p. 41a, *infra*), his central holding that *Watson* v. *Jones* reserves to religious organizations "power to decide for

themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference" (344 U. S. at 116). And notwithstanding that Judge Conway's ruling that *Watson* v. *Jones* does not apply was overruled by Justice Reed, who held that case controlling by constitutional compulsion, the majority attached a "basic qualification" to the application of that case, namely, that the court must first find that the supreme church authority, in this instance the Patriarchate, "must in truth and fact be capable of functioning freely with its activities directed by churchmen in the interest of the church and in accordance with the organic law of the church" and that "the civil court is under a duty, if such issue is raised, to ascertain whether the purported authority is duly constituted and functioning" (pp. 41-2a, 23a, *infra*).

Accordingly, the majority ordered a new trial to resolve the issue whether the Patriarchate is subject to the domination, and is an agency, of the Soviets and in the resolution of that issue directed the trial court "to make findings of fact and to exercise sound discretion thereon" (pp. 40a, 37a, 36a, *infra*).

Judges Desmond and Fuld, who together with Chief Judge Loughran (who had died in the meantime) had dissented on the original appeal, again dissented on the ground that the order for a new trial was "action most inconsistent" with this Court's mandate, that such a trial "has been banned in advance * * * by the Supreme Court, as an unconstitutional intrusion of the State of New York into the inner affairs of a church", that it "violates not only the Supreme Court's mandate, and the First Amendment, but long and thoroughly settled New York law", and that "we are licensing a trial in a civil court to find a fact which if found could be no basis for any constitutionally valid judgment" (pp. 48a, 49a, *infra*).

In 346 U. S. 893 (*Ex parte Kedroff*) this Court, two justices dissenting, denied a motion by petitioners' predecessors for leave to file a petition for a writ of mandamus against the judges of the Court of Appeals, but this denial must be considered as one based on a matter of procedure and unrelated to the merits (*Roche* v. *Evaporated Milk Association*, 319 U. S. 21; *Ex parte Fahey*, 332 U. S. 258; *Bankers Life Cas. Co.* v. *Holland*, 346 U. S. 379; *Parr* v *United States*, 351 U. S. 510).

On the new trial the trial court found that the Patriarchate was not subject to the domination and was not an agency of the Soviet state, found that it was capable of functioning freely with its activities directed by churchmen in the interest of the Church, in accordance with its organic law, and that it was duly constituted and functioning (pp. 68-9 of record below) and exercised discretion in its favor (pp. 70, 73 of record below). These and the other findings of the trial judge (pp. 42-70 of record below) are deeply rooted in and accurately summarize the evidence and were unanimously affirmed without opinion by the Appellate Division. But the Court of Appeals, again by a vote of four to three, again in an opinion by Judge (then Chief Judge) Conway, again re-affirmed their domination and trustee theories and the basic views expressed in their prior two opinions, but this time, in addition, went beyond their appellate power to review only questions of law (N. Y. Const. Art. VI, sec. 7; C. P. A. Sec. 605), assumed the role of a jury and, on the basis of a highly selective version of the facts, undertook to "disregard" (p. 21a, *infra*) the findings and discretion of the lower courts and to substitute in their place their own findings and discretion (which they do not have), to the effect that the Patriarchate was "dominated" by and was an "agency" of the Soviets, and on the basis thereof decided that the Patriarchate was not "qualified" to be a "trustee" of the Cathedral, declared forfeit the time-honored canonical jurisdiction of the Patriarch and his bishop over the Cathedral, reversed the judgment

in their favor and ordered their ejectment therefrom. At the same time Chief Judge Conway allowed the Patriarch—and this is fatal to his holding—to appoint bishops, establish and maintain churches—i.e., have a canonical jurisdiction—in New York (p. 25a, *infra*).

The three dissenting judges, again speaking through Judge (now Chief Judge) Desmond, said that the majority decision contravened Justice Reed's opinion, *Watson v. Jones*, and the First and Fourteenth Amendments, and also violated the state constitutional and statutory limitations on the jurisdiction of the Court and that "There can be found no other decision in this Court wherein we have taken to ourselves power to disregard affirmed findings of fact made on a resolution of a question of fact" (p. 27a, *infra*).

Thus we see that the majority below invented three unsound theories—the domination theory, the trustee theory, and the discretion theory—to reach an unconstitutional result, and, in their last decision, went beyond the confines of their jurisdiction to do so.

Nature of the Action

(Unidentified numbers in parentheses refer to pages of the printed case on appeal used in the state court. The record of the first trial was received in evidence below but was not again printed. We respectfully ask (see p. 25, *infra*) leave to refer to the record used in this Court on the first appeal (344 U. S. 94; No. 44-1951). Page references thereto will be preceded by the letters "U.S.").

This is a suit in ejectment (5-7). Respondent, a New York corporation, holds the nominal legal title to Saint Nicholas Cathedral in the City of New York. It is controlled by the leaders of a group of Russian churches which, in 1924, at a convention in Detroit, purported to secede from the Russian Church at large and organized themselves "temporarily" as an "administratively autonomous metropolitan district" and elected their own archbishop. Peti-

tioner Vik is the archbishop of the American Archdiocese of the Russian Orthodox Church by virtue of his appointment to that office by the Patriarch and he asserted the defense that, as such accredited archbishop, under canon law, he had the exclusive right to occupy the Cathedral. Petitioner Dionysius, as his substitute, and petitioner Kreshik, as Dean of the Cathedral, by like appointment, asserted a similar defense (pp. 7-14). The majority below decided the case on the issue whether the bishop appointed by the Patriarch or the official locally elected by the metropolitan district had the right to use and occupy the Cathedral.

Although petitioners believe they are entitled to judgment on the record even as set forth in the opinion of the majority below, they cannot accept the majority's version of the material facts. Not only are they at variance with the findings of the trial courts which are deeply rooted in the evidence, but they are also in conflict with the studies of scholars in the field (Curtiss, "*The Russian Church and the Soviet State*"; Timasheff, "*Religion in Russia*", in symposium, "*The Soviet Union*", edited by Professor Gurian of Notre Dame University).

This Court is not bound by the majority's assertions or conclusions of fact (*Feiner* v. *N. Y.*, 340 U. S. 315, 316, 322; *Niemetko* v. *Maryland*, 340 U. S. 368, 371; *Staub* v. *City of Baxley*, 355 U. S. 313, 318-19; *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522-5). In *Feiner* this Court said (p. 316): "In the review of state decisions where First Amendment rights are drawn in question we, of course, make an examination of the evidence to ascertain independently whether that right has been violated".

As an aid to the court, petitioners, mindful of the need to be brief, offer a condensed version of the relevant facts in Appendix E, annexed hereto. Here they wish to say this much:

The Russian Church is hierarchal in its form of government and its Supreme Authority prior to 1918 was vested in a Holy Synod and thereafter in a Patriarch who, in turn, is elected by a sobor, or general convention of the Church (p. 53a, *infra*).

In 1945 at such a sobor, which was attended by Patriarchs, bishops and other representatives of the Orthodox world (p. 54a, *infra*), and which this Court said was "admittedly canonical" (344 U. S. at 104), the present Patriarch, Alexy, was elected by due process of canon law. Patriarch Alexy is universally accepted as the canonical head of the Russian Church, as, in the words of Justice Frankfurter, "the legitimately chosen holder of his office" (344 U. S. at 125).

His predecessor, Sergius, was acknowledged by the Orthodox World as the canonical head of the Russian Church from 1926 until his death in 1944. So was Tikhon, who was elected Patriarch at the Sobor of 1917-18, until his death in 1925 (pp. 53a, 54a, *infra*).

The American Archdiocese was founded by the Holy Synod, was a constituent part of the Church at large and was governed by a bishop appointed by the Synod (pp. 55a, 56a, *infra*). Secession or autonomy of a parish or diocese without consent of Higher Authority is barred by canon law (1928-9, p. 56a, *infra*).

Saint Nicholas Cathedral was built about 1899-1903 by order of the Holy Synod with money supplied by it and the Russian government, amounting to about $140,000 (p. 56a, *infra*). The Cathedral was designed, in the words of the authorizing document, as a "shelter for His Grace the bishop" (p. 1340; p. 56a, *infra*). The right of the appointed bishop under the canon law of the Russian Church as an attribute of his episcopal office to use and occupy Saint Nicholas Cathedral as his residence, as a place of worship and as the seat of the government of the diocese has never been questioned (p. 56a, *infra*). Even the majority acknowledge as much (p. 10a, *infra*).

In 1924 about 120 out of a total of about 180-190 Russian parish churches organized themselves "temporarily" as an "administratively autonomous metropolitan district" and elected their own bishop. Thereafter some parishes joined and others left the district (p. 59a, *infra*). The district is merely a splinter of the Diocese.

In the 1946 convention of the metropolitan district, the membership "resolved that His Beatitude Alexy, Patriarch of Moscow and All Russia, be requested to continue us in his fold and be our spiritual head" on terms of autonomy (pp. 1181-3; pp. 57a, 58a, *infra*).

This resolution was based on a memorandum by the experts of the district (U. S. pp. 242-7) wherein they acknowledged the canonical infirmity of the district (U. S. pp. 243-4), said that the Patriarchate "has in no way digressed from the dogmas, canons, or the rites of Orthodoxy" (U. S. pp. 244, 246) and that its "adherence to a political line, for which it is often criticized today, cannot be the deciding influence concerning its canonical status" (U. S. p. 246), which they said was no impediment to the "canonical subordination of our Church to the Moscow Patriarchate" (U. S. pp. 245-6), a course which they recommended and which, as we have seen, was followed.

Following this resolution, negotiations between the Patriarchate and the metropolitan district for reunion were resumed (pp. 1178-81) and the Patriarch offered the district autonomy on purely canonical terms which were to conform to our laws (pp. 1448-55, 1452; pp. 58a, 59a, *infra*).

The Patriarchate now has 80 diocese, 80 bishops, 25,000 parish churches, 25,000 parish priests, 90 monasteries, 2 theological academies, 8 seminaries (their curricula are of the highest order) and plants for the manufacture of religious objects and the publication of religious books and the Bible (pp. 60a, 61a, *infra*). The Church makes its living from the people, who shower it—in the words of Harrison Salisbury—with a "blizzard of ruble notes", which have

to be collected in bushel baskets farmers use to collect produce (p. 61a, *infra*). The Soviets do not interfere in the internal affairs of the Church or in the selection of the clergy (p. 61a, *infra*). According to Curtiss, the Patriarchate has received a "marked rejuvenation" (p. 60a, *infra*). Dr. Spinka, one of respondent's experts, says that Patriarch Alexy's actions were "voluntary" and that a highly favorable view of his policies may be taken (p. 62a, *infra*). Dr. Gsvosky also said that the Patriarchate "must be reckoned with as an independent social force" (p. 60a, *infra*).

In the light of the foregoing and of the indisputable facts set forth in Appendix E, we must regard as contradicted or unsupported by evidence, as arbitrary and partisan, the claims of the majority below that by 1924 the Patriarchate had "ceased to exist", that this "described status" is the same today "without essential change", that the Cathedral was "dedicated" to the metropolitan district, which is "now" the diocese, that the Patriarchate has departed from the customary "doctrine" of the Church, that it has been "absorbed" by the Soviets, that its actions have been deprived of "any religious significance", that it has only a "nominal" or "bare" existence which is not the "kind" of existence which would "qualify" it as a "trustee" so as to "permit" it to resume control of the Cathedral.

REASONS FOR GRANTING THE WRIT

1. The decision below directly contravenes this Court's prior opinion in *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94.

On the prior appeal in this very case, this Court expressly held that freedom to select the clergy, where no improper methods of choice are proven (and none were shown here), partakes of the free exercise of religion protected by the Constitution against state interference. *Ked-*

roff v. *St. Nicholas Cathedral*, 344 U. S. 94. And as a necessary part of that constitutionally protected freedom, church custom or law on ecclesiastical issues—even where property rights are affected or are involved—must be considered controlling in civil courts. Finding that the ouster of the patriarchal bishop contravened this constitutional principle, the Court reversed the original decree of the New York Court of Appeals and remanded the case to that court for further action "not in contravention of this opinion."

The New York Court of Appeals has now taken action which in fact is "in contravention of this opinion." It has sanctioned under the guise of the common law what this Court said was constitutionally improper when framed in statutory language. In its two opinions subsequent to this Court's mandate—the opinion ordering a new trial and the opinion reversing the findings and conclusions of the trial court—the New York Court has completely reaffirmed its previous views which had been rejected by this Court. True, the majority below no longer lean on the statute; but they proceed to apply the same reasoning, the same ideas and the same concepts as previously expressed in order to reach a result which this Court has already branded as unconstitutional.

At the core of this Court's prior opinion was the concept that religious organizations are constitutionally "free from state interference" in matters of church government. 344 U. S. at 116. But the court below dismissed that holding as a "passing comment, unnecessary to the actual decision of the court upon the validity of Article 5-C." Without any further examination of the rationale of this Court's considered opinion, the court below proceeded to the conclusion that religious organizations are subject to state interference in matters of church government when that interference is clothed with the common law rather than statutory law. In other words, the decision below seems to be this: true, the ouster based on a finding of domina-

tion made by a statute prohibits the free exercise of religion, but the ouster based on a like finding by a court does not.

Such a holding is untenable in light both of the Constitution and of this Court's holding. Basic to this case is the fact that the Constitution—the First Amendment as incorporated by the Fourteenth Amendment—prohibits state interference with the internal control of church administration and of clerical appointments. It was that *constitutional* prohibition, not the presence of a statute, that was paramount in this Court's prior decision. As this Court stated, 344 U. S. at 107, "an enactment by a legislature cannot validate action which *the Constitution prohibits.*" (Emphasis added.)

Once it is evident that the Constitution prohibits certain state action, it matters not whether that action be in legislative, executive or judicial form. As stated most recently in *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 463: "It is not of moment that the State has acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize." See also *Shelley* v. *Kraemer*, 334 U. S. 1; *Barrows* v. *Jackson*, 346 U. S. 249.

Put in terms of the facts of this case, this Court has already held that the Patriarch's appointment of the bishop and his use of the Cathedral are immune from "state" interference. And that interference is nonetheless unconstitutional when cast in the form of the common law than when directed by a statute. In either event the state action "prohibits the free exercise of religion." (344 U. S. at 108). And when this Court ordered further action "not in contravention of this opinion," it obviously did not authorize the court below to ignore or intrude upon the constitutional limitations imposed on the state judiciary.

The fact that the majority below may have felt that the evidence or their own intuition (in disregard of the findings

of the trial courts) demonstrated that the Russian Government exercised control over the church authorities, did not give it any greater power to interfere with the constitutional rights at stake or to ignore the sweeping effect of this Court's prior opinion. Precisely that same consideration was thought by the court below to have motivated and justified the state legislature in enacting Article 5-C of the New York Religious Corporations Law. But in light of that fact this Court was unyielding in its holding that the statute, ordering the ouster of the patriarchal bishop, violated the constitutional prohibitions (see 344 U. S. at 108-110). And so here the lower court's belief that the Russian Orthodox Church is Soviet dominated cannot give that court any authority or justification for ordering the transfer of ecclesiastical control of church property in contravention of the Fourteenth Amendment's command.

Because the decision below is so patently at odds with the opinion and mandate of this Court in *Kedroff v. St. Nicholas Cathedral, supra*, the grant of certiorari in this case becomes not only appropriate but essential if due respect for this Court's orders is to be maintained.

2. The decision below directly conflicts with this Court's decision in *Watson* v. *Jones*, 13 Wall. 679.

The case of *Watson* v. *Jones*, 13 Wall. 679, as this Court explained in its earlier opinion (344 U. S. at 115), was decided without dependence upon the subsequent judicial recognition that the Fourteenth Amendment incorporated the First Amendment's prohibition against governmental interference with freedom of religion. Nevertheless, that decision rendered in 1871 clearly stated a controlling doctrine that it is of the essence of free religious institutions that the chief authorities of an hierarchal church resolve all controverted matters of ecclesiastical cognizance—such as questions of discipline, faith, rule, custom or law. But as

this Court further recognized (344 U. S. at 116), the *Watson* v. *Jones* decision radiates "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."

And since the instant controversy "concerning the right to use St. Nicholas Cathedral is strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America" (344 U. S. at 115), the decision below flatly contradicts and collides with the "spirit of freedom" concepts which permeate *Watson* v. *Jones*—where no statute was involved. Indeed the rule of *Watson* v. *Jones* has been elevated by this Court to constitutional status, giving to it an effect that cannot be ignored by the court below. And the express statement of the Court of Appeals (p. 41a, *infra*) that this Court's references to *Watson* v. *Jones* were mere dictum and without intent "to make a pronouncement of such major proportions" in itself creates an issue appropriate to warrant the exercise of this Court's certiorari jurisdiction at this juncture.

3. The decision below directly interferes with the constitutional right of freedom of religion guaranteed by the First Amendment as incorporated by the Fourteenth Amendment.

It follows from both the decision of this Court in the prior hearing of this case and the decision in *Watson* v. *Jones*, as incorporated and adopted anew in constitutional terms in the prior decision here, that the decision below directly interferes with the free exercise of religion protected by the Fourteenth Amendment.

That decision violates not only the "free exercise of religion" clause of the First Amendment, but also the

"establishment" clause, for it "establishes" the metropolitan district as the official Russian Orthodox Church in the State of New York and "enthrones" its elected, but unconfirmed, official as the canonical archbishop thereof. (see 344 U. S. at 122).

The guarantee of religious liberty, said Mr. Justice Jackson, "was first in the Bill of Rights because it was first in the fore-fathers' minds; it was set forth in absolute terms and its strength is its rigidity" (*Everson* v. *Board of Education*, 330 U. S. 1, 26), and he also said that "religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be." (*Prince* v. *Massachusetts*, 321 U. S. 158, 177).

The conduct of religious services in the Cathedral by the appointed archbishop is required by canon law and is a religious activity which concerns only members of the faith and ought to be as nearly absolutely free as anything can be. It is part of the sacramental system of the Church which is totally immune from curtailment by the civil power.

In sum: (1) This Court said that the appointment by the Patriarch "validly selects" (344 U. S. at 96) the bishop of the diocese and that such appointee has the right to occupy the Cathedral. Judge Conway says no, the local electee has the right to the Cathedral.

(2) This Court said that the appointed bishop cannot be ousted by state action (which includes judicial action). Judge Conway says he can be ousted by judicial action.

(3) This Court said that the ouster of the appointed archbishop curtails the free exercise of religion. Judge Conway says no.

(4) This Court said that a finding that the Patriarchate is subject to the domination and is an agency of the Soviet state does not justify the ouster. Judge Conway says it does.

(5) This Court said that *Watson v. Jones* establishes a constitutional doctrine. Judge Conway says it does not.

(6) This Court said that *Watson v. Jones* (where there was no statute) governs the case. Judge Conway says it does not, and in any event, attaches to it a "basic qualification" which nullifies the doctrine of that case.

(7) This Court said that *Watson v. Jones* establishes that churches may "decide for themselves free from state interference, matters of church government" and that "freedom to select the clergy" now has "federal constitutional protection". Judge Conway dismisses this as a "passing comment, unnecessary to the actual decision" of the case.

(8) This Court said that the Patriarch never relinquished his authority over the diocese or the right to appoint its bishops and never recognized the autonomy of the metropolitan district. Judge Conway says this is an "assumption" contrary to fact.

(9) This Court overruled Judge Conway's trustee theory, but Judge Conway nevertheless bases his decision thereon.

(10) Notwithstanding the reversal by this Court, Judge Conway says that on the remand he could have ousted the patriarchal bishop "as a matter of law" (p. 15a, *infra*).

(11) The remand required the Court of Appeals to take no action in "contravention" of Justice Reed's "opinion", but Judge Conway rejects one portion thereof as dictum and another as based on an assumption contrary to fact. Thus, Judge Conway's decision of *necessity* is based on a *rejection* of Justice Reed's opinion. They are utterly incompatible.

The denial of the application for Mandamus has no bearing on the merits of this petition. Mandamus is an awkward remedy which casts judges in the role of defend-

ants, is discretionary in the extreme, and is rarely granted. Indeed a recent study in 59 Columbia Law Review 669 (April, 1959), suggests that this Court has no power to issue Mandamus against state courts unless a federal statute is involved. At any rate, the decision ordering a new trial for the exercise of discretion, lacked the requisite *finality* for review by this Court at that stage of the case (*Gospel Army* v. *Los Angeles*, 331 U. S. 543), and since this Court is opposed to fragmentary or piecemeal review, particularly of intermediate decisions, sound discretion may have dictated postponement of review of the order for a new trial until the *final* adverse decision on the new trial (*Republic Gas* v. *Oklahoma*, 334 U. S. 62), which did not materialize until the decision below (*Bankers Life Cas. Co.* v. *Holland*, *supra*, pp. 383-4).

The majority below distort *Romanian Orthodox Missionary Episcopate of America* v. *Trutza* (205 F. 2d 107, cert. denied 346 U. S. 915) and lean heavily on the distortion. In that case plaintiff Moldavin's complaint was dismissed because he failed to prove that he was appointed or elected a bishop by anyone authorized to do so. Thus the court said (*id.* at 113): "As Moldavin has not shown himself to be a bishop elected either by the church congregation, by the Holy Synod, or by any ecclesiastical body of the Romanian Orthodox Missionary Episcopate, he is not entitled to the relief sought." In the circumstances, anything else in the opinion is necessarily dictum and this Court hardly grants certiorari to review a dictum. In our case we have a bishop duly appointed by a Patriarch duly elected. That should end the matter.

4. The decision below deprives the Patriarch and his bishop of a property right in the Cathedral without due process of law and denies them the equal protection of the laws.

(a) The Cathedral was built and maintained by the Holy Synod with its money for the use of its bishop. From the beginning it has so been used. The Patriarchate, as the successor of the Holy Synod, has (apart from its religious and canonical interest) a vested *property* interest in the Cathedral and its use by it and its bishop as his *residence* and as the headquarters of the diocese. The ouster of the bishop is thus a taking of property without due process of law in contravention of the Fourteenth Amendment. Petitioner Kreshik is the Patriarch's representative to protect his property interest in the Cathedral (pp. 1462, 13-14).

(b) Since the majority in this particular case went beyond their appellate jurisdiction, honored in all other cases (p. 27a, *infra*), to reverse the judgment in petitioners' favor, they have been denied the equal protection of the laws (*Fowler v. State of Rhode Island*, 345 U. S. 67; *Yick Wo* v. *Hopkins*, 118 U. S. 356).

5. The federal questions presented are substantial.

Obviously the decision below raises fundamental issues of serious import transcending petitioners' grievance as private litigants. The violation of religious liberty is gross and manifest, the theory of decision is unprecedented and contrary to correct constitutional doctrine. It holds potentials of danger to all churches and invests the civil courts with power to reorganize their internal discipline and nullify their canon law. It is in conflict with this Court's opinion expressly or by necessary implication and with *Watson* v. *Jones*. The writ should be granted.

This Court Should Summarily Reverse the Decision Below

For the reasons stated, this Court should summarily reverse the decision of the Court below. That decision merely reaffirms a doctrine and theory of decision which has already been reversed by this Court and which is unconstitutional on its face. The majority's *ad hoc* trustee and discretion theories are unsound and their domination theory is factually unsupported and, in any event, furnishes no constitutional justification for the forfeiture of the canonical rights of the Patriarch and the breach of the guarantees of religious liberty. That theory awards the Cathedral to an official who may be orthodox in his politics but not Orthodox in his canonical standing; it imposes a *political test* for the exercise of a *religious* right. The decision is indefensible.

Summary reversal is appropriate in this case. It is consistent with this Court's practice in cases not only where the law is settled by a prior decision (e.g., *Alleghany Corp.* v. *Breswick & Co.*, 355 U. S. 415; *U. S.* v. *Palletz*, 330 U. S. 812 and five subsequent cases summarily reversed on the authority thereof reported in 330 U. S. 812 and 831 U. S. 791), but also where the action of the lower court was clearly improper (*Franklin* v. *Jonco Aircraft Corporation*, 346 U. S. 868; *White* v. *Howard*, 347 U. S. 910; and *Riss & Co.* v. *United States*, 342 U. S. 937).

We yield to none in our opposition to communism; but opposition to communism is not a mandate to bend the law to the supposed interest of the moment. We must not ourselves use those methods we profess to loathe in others. A comment in 64 Harvard Law Review 1361 saw in the first decision of the majority (302 N. Y. 1) "merely an indirect means of achieving an unconstitutional interference with religious freedom tacitly justified by a distaste for communism". The last two decisions of the majority, we submit, merit the same criticism.

CONCLUSION

It is respectfully submitted that this Court should grant the petition for certiorari, summarily reverse the final judgment of the Court of Appeals with directions to dismiss respondent's complaint. If summary reversal is not granted, all the questions presented should be considered and none is waived, even though not specifically discussed herein.

Respectfully submitted,

PHILIP ADLER,
Attorney for Petitioners.

PHILIP ADLER,
EUGENE GRESSMAN,
of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No.

WASSIL A. KRESHIK, as Dean of Saint Nicholas Cathedral, and BORIS VIK, as Archbishop, etc.,

Petitioners,

v.

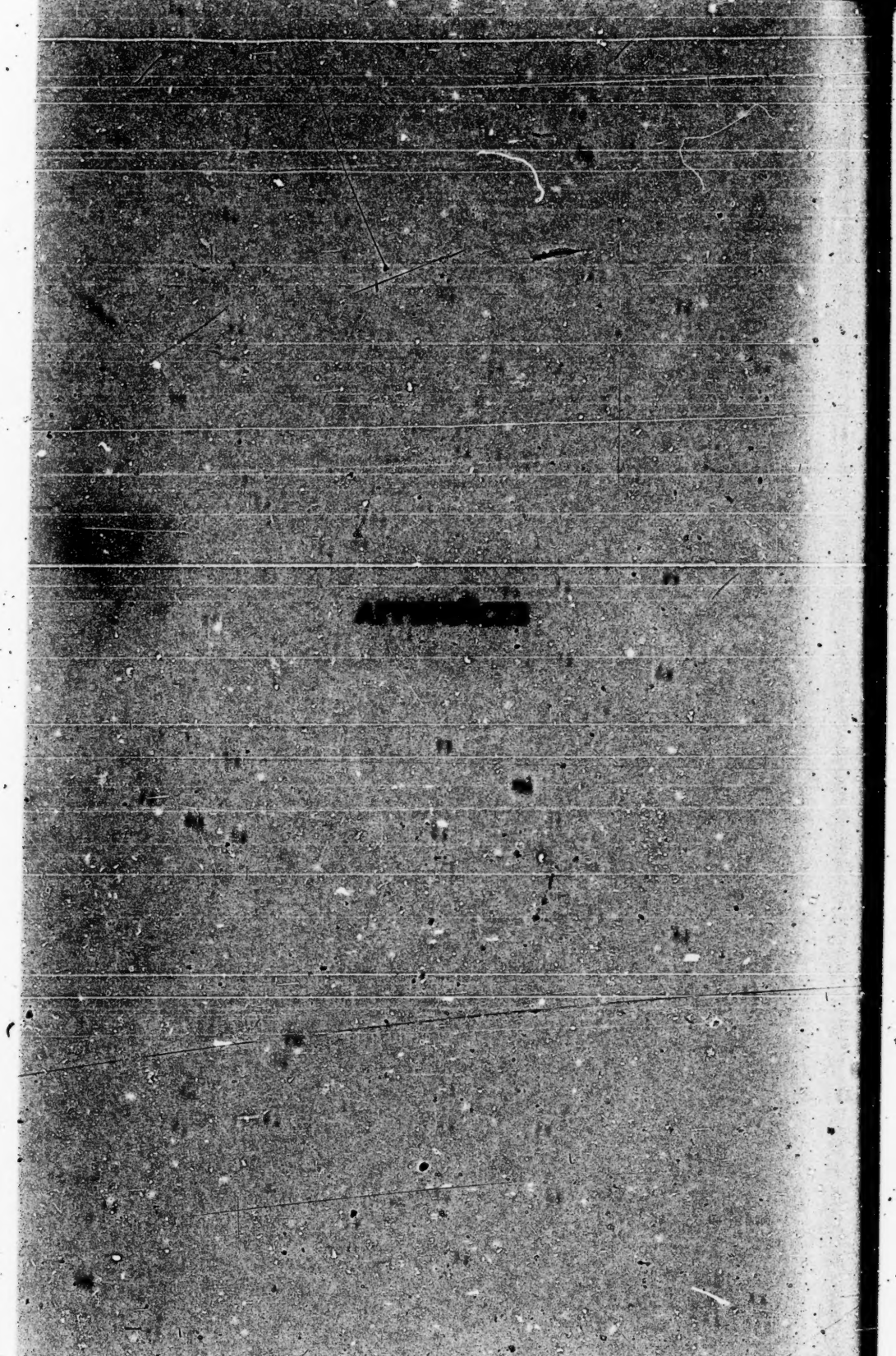
SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA,

Respondent.

The printed record on appeal of the first trial in the state court was received in evidence at the second trial (p. 646). This record, however, was not again printed. Petitioners respectfully request leave of the Court for counsel to refer to the printed record on appeal which was filed in this Court on the first appeal to it (*Kedroff v. St. Nicholas Cathedral*, No. 44-1951) and on the basis of which it decided the case in 344 U. S. 94.

Respectfully submitted,

PHILIP ALLER,
Attorney for Petitioners.



Appendix A

Opinion of Court of Appeals of the State of New York

—o—

SAINT NICHOLAS CATHEDERAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA,

Appellant,

v.

WASSIL A. KRESHIK, as Dean of Saint Nicholas Cathedral, et al.,

Respondents.

—o—

Chief Judge CONWAY. Two groups contend in this action for the right to the use and occupancy of St. Nicholas Cathedral in New York City. Both partake of the doctrine, creed and spiritual heritage of the Russian Orthodox Church, which is one of a loose association of eastern orthodox churches tracing a common origin and existence to the year 1054 when the Patriarch of Constantinople ceased to recognize the authority of the western or Roman church. In time, the Patriarch of Constantinople acknowledged various branches of the church in other nations as "autocephalous" or completely independent for purposes of government and administration. The Russian Orthodox Church, with its own Patriarch of Moscow, achieved the status of autocephaly in the 16th Century.

The Russian Orthodox Church was ruled by the Patriarch of Moscow until 1700 when Peter the Great established a Most Sacred Governing Synod to rule in place of a Patriarch. Throughout Czarist times, the church appears always to have had a very close connection and relationship with the civil authorities, having been supported by State subsidies and having as a member of the Holy Synod a Chief Procurator appointed by the Czar to protect and effectuate political interests.

To serve the religious needs of Russian immigrants, the Russion Orthodox Church, then ruled by the Holy Synod, established the Diocese of Alaska and the Aleutian Islands, later known as the Diocese of North America and the Aleutian Islands, in the latter part of the 19th Century. St. Nicholas Cathedral, the subject matter of this controversy, was built in 1903 as a parish church of the diocese and became a cathedral in 1905 when the See of the diocese was moved from San Francisco to New York.

Synodal rule of the church was terminated and the Patriarchal form of organization was reinstated by a "Sobor" or convention of the Russion Orthodox Church held in Moscow in 1917-1918 and which was convened in the brief inferval of freedom between the overthrow of the Czarist regime and the rise of the Bolsheviks. That sobor, which is conceded by all to have been canonical and valid, elected one Tikhon as Patriarch of Moscow. Shortly after Tikhon's election, when the Communists came to power, there commenced a long campaign of harassment and persecution aimed at eradicating the church from Russian life.

Upon the occurrence of a vacancy, Patriarch Tikhon appointed one, Archbishop Platon as head of the North American Diocese. The appointment was made verbally at first, in view of the difficulty in transmitting such a communication out of Russia, but later, in September, 1923, it was confirmed in writing. At that time, the persecution of the church in Russia by the Soviet Government was at its peak of violence and virulence. The Communists, of course, were militant atheists committed to the doctrine that religion is the opiate of the people. Moreover, many of the ruling clergy, having held positions of importance under the Czar, were obviously counterrevolutionary in outlook and belief. The Soviet Government, therefore, attacked the church with every means available, both directly, through confiscations, arrests, imprisonments, exiles and executions and, indirectly, through cultivation and support of divisive and dissident elements within the church. As a result, by

this time, the activity and authority of the Patriarch in Moscow had virtually ceased to exist.

The North American Diocese, clergy and faithful, were bewildered and confused at the inconsistent and improbable reports and orders emanating from Moscow. For example, only five months after his appointment by Patriarch Tikhon, a document appeared here purporting to have been issued by Tikhon which dismissed Platon as archbishop for engaging in counter-revolutionary "acts * * * directed against the Soviet." There remains grave doubt as to whether the Patriarch really issued such a document, at least as his own voluntary act. In any event, it had become clear to the North American Diocese that the Patriarch and the church administration in Moscow were no longer in effective control of the church. In addition, as we shall see, imposters were appearing in this country seeking to seize control of the administration of the diocese, and all its properties and temporalities.

The perils and uncertainties then existing prompted Archbishop Platon, still recognized and revered by the American clergy and faithful, to call a sobor of the North American Diocese at Detroit in 1924. The sobor concluded that Patriarch Tikhon was under coercion and duress by the Communists, that failure to act would result in anarchy for the North American Diocese and that it was necessary for the diocese to create its "own firm Church administration, completely insured against possibility of the direct or indirect influence of the Soviet power." A resolution was adopted asking Archbishop Platon to head the administration of the church. Another resolution stated it to be the will of the sobor "Not to break at all the spiritual ties and communion with the Russian Church, but always to pray for her good".

The Detroit sobor of 1924, in effect, declared that the North American Diocese (or Metropolitan District, as it came to be called) should exercise administrative autonomy free of the Patriarchate with the right of local election of

its bishops. This declaration of autonomy was made under a previous ukase or order of the Patriarch issued in 1920 which permitted dioceses to organize on a local basis in the event the activity of the Patriarchate should stop and in the event such cessation of activity should acquire a protracted or even permanent character. During the imprisonment of the Patriarch, the substance of the ukase was repeated in a circular letter sent to all dioceses on behalf of the Patriarch in 1922 directing local hierarchs to "administer your archdiocese independently, in accordance with the Holy Writ and the holy canons; and until the restitution of the Supreme Church government decide definitely all affairs about which formerly you were wont to request the decision of the Holy Synod." The ukase of 1920 had also provided that all local measures were to be submitted for confirmation to the "Central Church Authority" when it is re-established. The Detroit sobor, in establishing the Metropolitan District here, thus stated that the final regulation of questions arising from the relationship of the Russian church and the North American Church would be left to a "future Sobor of the Russian Orthodox Church which will be legally convoked, legally elected, will sit with the participation of representatives of the American Church under conditions of political freedom."

Patriarch Tikhon died the following year, 1925. He had provided that the administration of the church, following his death, should be in the hands of a "locum tenens" or "guardian of the Patriarchial Throne." He had nominated the person so to act, plus an alternate, but by reason of arrests and exiles neither of the named individuals was able to serve for any significant period. They in turn had named further appointments, and, ultimately, there emerged one Sergei who as deputy of the *locum tenens* became the *de facto* leader of the church in 1926.

There followed a period of struggle and adjustment between the Soviet State and the church as led by Sergei. He was imprisoned, but later released after he had, in 1927,

entered into a *modus vivendi* with the Soviet under which the Patriarchal church, in return for legal recognition, gave its pledge of loyalty to the government both on behalf of the church in Russia and the church abroad. He "demanded from the clergy abroad a written promise of their complete loyalty to the Soviet government in all their public activities. Those who fail to make such a promise, or to observe it, shall be expelled from the ranks of the clergy subject to the Moscow patriarchate". The agreement amounted to a capitulation by Sergei to the Soviet, but under it, or because of it, Sergei was able to act as leader of the Patriarchal church in Russia over the next decade, despite the continuance of strong antireligious propaganda and repressive action on the part of the Communists.

During this period, in 1934, Sergei, as *locum tenens*, issued a condemnation against the declaration of administrative autonomy adopted by the Metropolitan District in 1924. He placed Archbishop Platon and his successor, Archbishop Theophilus, under a prohibition and appointed Benjamin Fedchenkoff to come to America to establish a diocese subject to the jurisdiction of the Patriarchate. Sergei's insistence upon a pledge of "loyalty" to the Soviet regime was abhorrent to the members of the Metropolitan District and the overwhelming mass of the clergy and faithful here continued to adhere to the Metropolitan District which grew and prospered in ensuing years.

A subsequent effort at rapprochement between the Patriarchate and the Metropolitan District was made in 1945. Following the patriotic support and service rendered by the Patriarchate to the State during the invasion of Russia by Germany, Stalin permitted a sobor to be convened in Moscow in 1943 which elected Sergei as Patriarch and upon his death, in 1945 another sobor was called. Delegates from the Metropolitan District of America were invited but were prevented from reaching Moscow until after the sobor had adjourned.

They there found that Alexei had been elected Patriarch. In previous negotiations, while he was *locum tenens* under

Sergei, Alexei had made it clear that any reconciliation would have to be predicated upon "the demand of the fullest loyalty, that is, complete abstention from attacks on the Soviet Power, is not a political, but an *ecclesiastical* condition." (Emphasis is Alexei's.) When the American delegates ought to obtain from Alexei, as Patriarch, a lifting of the spiritual separation from the church in Russia on terms of autonomy for the American group, Alexei renewed his demand for a pledge of abstention from political activities and also imposed a requirement of Patriarchal confirmation of the election of an archbishop to replace Theophilus who was apparently to be deposed.

The American group viewed the provision regarding abstention from political activities as tantamount to a pledge of loyalty to a foreign power. Moreover, there was as yet no clear evidence that the subjection of the Patriarchate to an atheistic government—the condition which occasioned the original declaration of autonomy—had in any way ceased or changed. Thus, they felt that acceding to Alexei's insistence upon ultimate authority over the Metropolitan District (as evidenced by the demand for the right to confirm candidates for bishop together with the right to reward the clergy with higher titles and the right of appeal) would result in acceptance of a hostile and irreligious control over the American church. In view of the failure of this and later attempts at reconciliation, the Moscow Patriarchate has on different occasions issued orders excommunicating the leaders of the Metropolitan District.

In 1945 this action was commenced by the Metropolitan District to obtain the use and occupancy of St. Nicholas Cathedral. The action was brought against an individual, John Kedroff, who was then in possession of the cathedral but who was not affiliated with either the Metropolitan District or the Moscow Patriarchate. Rather, he was a relic of the so-called "Renovated" or "Living" church, a clique of radical priests in Russia who, disgruntled and ambitious, were organized and supported by the Commu-

nists between 1918 and 1927. Because of this active assistance on the part of the Soviet Government, the living church had been able to depose Patriarch Tikhon and seize control of the church administration in Moscow—one of the factual conditions which, as we recall, led to the establishment of the Metropolitan District here.

The living church was relatively short-lived because it had no real popular support and it was eventually abandoned by the Soviet Government after Sergei capitulated in 1927. Nevertheless, during its existence, the living church had attempted to extend its jurisdiction over the North American Diocese by appointing one John S. Kedrovsky (the father of the John Kedroff above mentioned) as Archbishop of North America. Kedrovsky promptly commenced an action here to oust Archbishop Platon from the cathedral. Then, as now, information as to conditions in Russia was difficult to come by. In that action, Kedrovsky, the representative of a splinter group organized by an atheistic civil authority in Russia, was able to prevail over the rightful Archbishop Platon and wrested control of the cathedral from him. The judgment which put Kedrovsky in possession of the cathedral was affirmed by this court by application of the rule (enunciated in the case of *Watson* v. *Jones*, 13 Wall. [80 U. S.] 679, 724-727) that, in an ecclesiastical dispute involving a denominational church, the decision of the highest church judicatories will be accepted as final and conclusive by the civil courts. (*Kedrovsky* v. *Rojdestvensky*, 242 N. Y. 547.)

The instant action was, therefore, brought against John Kedroff and since he, as successor to Kedrovsky, the appointee of a nonexistent church, had no defense to the ejectment action, he sought out Benjamin, the Archbishop appointed by the Patriarchate, who reordained Kedroff as a priest, whereupon he "gave" the cathedral to Benjamin who was joined as a defendant in the action.

When the case reached us in 1950, the courts below had given judgment to the defendants by applying the rule of

Watson v. *Jones* (*supra*). We reversed that judgment, dividing our consideration of the case into two phases, one based upon common-law grounds and the other upon a specific statute which the Legislature had enacted in 1945, just prior to the commencement of this action, to govern the situation. (Religious Corporations Law, §§ 105, 107.) Since the statute, in terms, clearly evidenced a legislative intent to confirm the Metropolitan District in the possession, use, control and occupancy of St. Nicholas Cathedral, we reversed and granted judgment for the plaintiff, commenting that, in any event, a new trial would have been required on common-law grounds. (*St. Nicholas Cathedral* v. *Kedroff*, 302 N. Y. 1, 24.).

Upon appeal to the Supreme Court of the United States, our decision on the statutory ground was reversed, and the case remanded for further proceedings not inconsistent with the opinion of the Supreme Court. The majority there adopted the view that sections 105 and 107 of the Religious Corporations Law, as construed, constituted "a transfer by statute of control over churches" and was beyond the legislative power of the State of New York, violating the constitutional rule against prohibition of the free exercise of religion. (*Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94, 110.)

Upon the remand, we refused to direct final judgment in favor of the appointees of the Moscow Patriarchate. Instead, we ordered a new trial concluding that, although the Supreme Court had authoritatively eliminated the statutory base for decision, the alternative or common-law ground was still valid and unimpaired. (*St. Nicholas Cathedral* v. *Kedroff*, 306 N. Y. 38.)

We held that the ultimate and determinative issue to be tried was as to the domination of the Patriarch by the Communist government (306 N. Y., pp. 46-47; see, also, dissent, p. 56); as to whether the appointees of the Patriarchate were "mere puppets of a monolithic and atheistic secular power" (306 N. Y., p. 51); and as to whether "the Patri-

archate, though nominally re-established, cannot function except as an arm or agent of anti-religious civil government" (306 N. Y., p. 53). We emphasized this point, namely, that the mere existence of a nominal church organization in Russia could not be enough to satisfy us that its appointees would be the proper trustees to administer the cathedral if the Patriarchal church had been absorbed by the Soviet Government and its actions deprived, during the period of such domination, of any religious significance. To permit such a result would constitute an infringement on the right of free exercise of religion on the part of the Metropolitan District and would retard rather than advance the end of religious liberty by "requiring the communicants of the metropolitan district to acknowledge the administrative rule of persons whom they believe are mere puppets of a monolithic and atheistic secular power". (306 N. Y., p. 51.)

To repeat, the issue to be tried was as to the domination of the Patriarchate by the Communist government. Such reiteration is necessary since the Trial Justice and the dissenting opinion here prefer to treat the case as involving only whether the Patriarchate "is the head of a functioning religious order", paraphrasing out of context portions of our prior opinions. Of course, there never has been any question as to the existence in Moscow of an apparatus known as the Russian Orthodox Church and of an individual known as the Patriarch. The intervention of his appointee in this action is proof of his existence if proof were needed. To demonstrate, therefore, that the Patriarch exists and functions is merely to prove what is not disputed and results in obscurement of the real issue on which we ordered a new trial, namely, as to the subversion of the Patriarchate into an instrumentality of the Kremlin.

That new trial has now been had and, on the record and exhibits, we think that the domination of the Patriarchate by the Communist government, and the necessary subservience of the church in Russia to the Soviet State have

been conclusively proved and confirmed so that, as between the archbishop appointed by the Patriarch and the archbishop elected by the Metropolitan District, the latter has demonstrated its right to the use, occupancy and control of St. Nicholas Cathedral.

No one disputes that, prior to any time of trouble or dissension, St. Nicholas Cathedral had been dedicated as the See of the North American Diocese of the Russian Orthodox Church and was to be used and controlled by the archbishop of the diocese who was in turn appointed by and subject to the Holy Synod in Moscow or, in 1918, the Patriarch of Moscow.

Neither can it be disputed, however, that the cataclysmic events in Russia following the revolution there necessarily wrought a profound change in the status, government, organization and administration of the church. It seemed clear on the earlier record, and it is now beyond doubt, that the "general" or central authority of this church, the Moscow Patriarchate, persecuted as it was by the Communists, had ceased to exist as an operative and functioning entity by 1924 when the Detroit sobor of the North American Diocese declared its autonomy and assumed the right of local election of its archbishop.

The action was properly taken in pursuance of the Patriarchate's own grant of authority as evidenced by the ukase of 1920, but, even in the absence of such express authorization, there would have been inherent power in the leaders and faithful of the North American Diocese to protect their property and temporalities against diversion and dissipation by hostile elements operating independently or through the mechanism of a captive Patriarchate. After all, religious property such as St. Nicholas Cathedral was subject to the implied trust that it must be used and employed according to the discipline, rules and usage of the Russian Orthodox denomination and for the benefit of the members of its North American Diocese. The circumstances from 1918 to 1924 clearly warranted

the inference that continued control of the property and temporalities of the North American Diocese by those then acting for the Moscow Patriarchate would have resulted in a diversion of the property from this implied trust.

If the Patriarchate had announced its conversion to atheistic communism at that time, no one could rationally contend that the principle of denominational control of property would have required that American churches be turned over for use as anti-religious museums as was done in Russia. In that event, the faithful of the North American Diocese would have had the legal right, indeed, the duty, to see to it that such a broad fundamental departure by the "general" or central authority from its essential principles did also not entail the diversion of property from the accustomed use of those adhering to the denominational usage and for whom it was originally dedicated under conditions of implied trust.

What occurred in 1924 was different in degree and clarity, of course, but not in nature. The Patriarchate was being subjected and subordinated to an antireligious civil government. Sergei's capitulation, his so-called *modus vivendi* with the Communists, merely completed a process begun in 1918. What emerged was fundamentally different from what had been before. Was the change permanent? Was the Patriarchate, in its new condition of subservience to antireligious rulers, incapable of fulfilling its prior functions? The North American Diocese did not know for certain but they prudently did not delay action until they were divested of all their property.

Under the circumstances then existing, this court must hold that the Detroit sobor of 1924 properly and legally established the administratively autonomous Metropolitan District, with provision for local election of its own archbishop, and for control and use of the properties of the former North American Diocese. The rule of *Watson* v.

Jones (*supra*) does not and cannot control in a situation in which the conduct, composition or action of the governing body is such that, if given effect as to property rights, there would result a real and substantial departure from and a perversion of the implied trust to which the property is subject.

A recent illustration of this principle is found in a case strikingly similar to that at bar, *Romanian Orthodox Missionary Episcopate of America* v. *Trutza* (120 F. Supp. 183, affd. 205 F. 2d 107 [C. A. 6th], cert. denied 346 U. S. 915), which involved an action commenced by a bishop who had been consecrated as such by the Holy Synod and the Patriarch of Romania in Bucharest and sent here to assume jurisdiction over the Romanian Orthodox Church in America. In the action, the appointee of the Patriarchate sought to obtain possession and control of land, buildings and funds of the American church.

It was undisputed that by-laws of the American group had been adopted in 1935 providing for the election of the American bishop by the Holy Synod in Bucharest and that the church in America was to be "administered canonically, spiritually and administratively under the direction" of the Bishop with the approval of the Holy Synod at Bucharest. This, it is clear, presents a picture of a denominational church with a "general" or central authority, almost exactly parallel with the pre-revolutionary condition of the Russian Orthodox Church here.

In 1947, as recited by the Trial Judge in the *Truza* case (*supra*), "because of the fear of interference and meddling by the Romanian authorities with church affairs in the United States", the American group, through its leadership, the Episcopate Council, "decided to create an autonomous episcopate". This was confirmed by a special Episcopate Congress in Detroit which passed a resolution "restoring complete administrative autonomy to the Episcopate and declaring the right of the Congress henceforth to elect its own bishop." (120 F. Supp. 183, 184-185.)

Opinion of Court of Appeals of the State of New York

The Court of Appeals set forth at length a resolution adopted by the American Episcopate Congress (akin to the resolutions adopted by the Metropolitan District of the Russian Orthodox Church) justifying the declaration of autonomy on the ground that "following the installation in Romania of a Communist, dictatorial, anti-christian and anti-democratic government,—the Orthodox Church of Romania:

"(a) is no longer free to preach the word of God nor to propagate the true teachings of the Holy Eastern Orthodox Church and her Faith,

"(b) with complete disregard for the organizational Statutes of our Episcopate continues to meddle in problems, the solution of which is the exclusive right of the members of our Episcopate,

"(c) through her present leadership, completely enslaved by the political rulers propagates, among our faithful peoples here, ideas which are contrary to the free life conceptions and ideals held and respected by the American citizen,

"Now, therefore, BE IT RESOLVED, that: 1. The Romanian Orthodox Episcopate of America be and the same is hereby declared to be *completely autonomous* not only in its administrative but also *in its canonical* (spiritual) affairs, and thus free from all rules, regulations, orders, decrees, etc., emanating from the Patriarch or from the Holy Synod of Romania." Both the Trial Judge and the Court of Appeals held that the American group through its Congress was entitled to revoke the by-laws which gave the Holy Synod and Patriarch in Bucharest the power of appointment of American bishops and to assume autonomous status, still retaining control, use and possession of the properties and funds of the Romanian Orthodox Church here. At the time the by-laws were revoked, said the Court of Appeals, the American group had "discovered

that it was dealing, not with the Holy Synod and Patriarch, but with the Communistic government of Romania, which was dictating the appointment of its bishop in the United States of America and Canada."

The court continued (295 F. 2d, *supra*, p. 112): "We agree with the District Court that under these circumstances the defendants [the American group] were entitled to revoke their previous by-laws and to re-establish the by-laws of 1932. We also think that this conclusion is in accord with the spirit, if not with the letter, of the Kedroff case [i.e., the instant *St. Nicholas Cathedral* case on appeal to the Supreme Court, 344 U. S. 94] which declares that 'Freedom to select the clergy, where no improper methods of choice are proven * * * must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.' *Since this is true as to protection against the interference of an individual American state, we think it should be equally true as to protection against the domination and interference of a foreign state.*" (Emphasis supplied.)

The *Tratza* case (*supra*) and the one at bar are virtually on all fours, the only difference being that the American group of the Romanian Orthodox Church had originally been autonomous and had accepted the denominational control of the Synod and Patriarch of Bucharest in 1935 surrendering their right of local election of bishops. Nevertheless, upon adoption of the new by-laws in 1935, the American group clearly assumed a status in relation to the Patriarch of Bucharest identical with that held by the North American Diocese in relation to the Patriarch of Moscow in 1918. The two cases necessarily involve the same essential question, namely, whether a former diocese or dependency of a foreign mother church can declare its autonomy and retain its temporalities in the face of the radically changed status, control and composition of the mother church as a result of political factors.

The Court of Appeals answered that question in the affirmative and the Supreme Court of the United States, despite the citation of its decision in *St. Nicholas Cathedral v. Kedroff* (*supra*), denied certiorari (346 U. S. 915). By this action, which permitted the American adherents of the church to retain their temporalities free of the former central authority, it would seem that the Supreme Court recognized what a majority of this court has always recognized, that, with respect to religious properties within their jurisdiction, American courts have a responsibility and duty to prevent seizure and control by agents of a foreign atheistic State acting in the name and guise of a church administration they have infiltrated and subverted. What worse violation of the religious liberties of our people can be envisioned than to require that they subject themselves to the ecclesiastical rule of persons acting for a godless foreign regime as the price of continued use of their churches!

On the facts of the instant case, and on the reasoning of the *Trutza* case (*supra*) in a parallel situation, we think that religious properties of the former North American Diocese should remain subject to the control, use and occupancy of the faithful here, and of their duly invested clergy, following the declaration of administrative autonomy by the Detroit sobor of 1924.

This could probably have been decided as a matter of law on the record of the first trial herein, on the first appeal or upon the remand by the Supreme Court. There remained, however, some uncertainty as to the condition and status of the Moscow Patriarchate and its relationship with the Soviet State during and after the World War. This action was first tried in 1947 and, apart from other insufficiencies of proof, was too close in time to the events involved to provide the proper predicate for final determination. We, therefore, ordered a new trial as set forth earlier.

We have seen that Alexei was elected Patriarch of Moscow at the sobor of 1945 succeeding Sergei who had died. It is a matter of history that when the Soviets were fighting for survival during the World War, and in view of defections by the populace to the German invaders who had opened the churches and proclaimed freedom of worship, Stalin granted concessions to Sergei and received in return the patriotic support of the Patriarchate throughout the war. It is clear that some sort of a bargain was struck, then and since, whereby the Patriarchate was permitted to exist and function on a limited scale in return for some service which it might render to the Soviet State. Of course, we can never hope to know precisely what the terms of the bargain were. The new trial does, however, shed some light in our effort to ascertain the postwar relationship between the Patriarchate and the Communists.

What we see is a picture of the church and its leaders permitted a nominal existence and observance of religious rites within Russia on a narrow scale. We see further certain evidences of religious feeling and interest on the part of a portion of the Russian people. On the other hand, there is overwhelming and conclusive evidence that this nominal existence and the performance of these rites are permitted by the Soviet Government simply as a matter of expediency, that the Patriarchate either willingly or as the price of survival serves the aims, purposes and objectives of the Soviet Government at home and abroad, and that, within the framework of our prior decisions in this case, no essential change has occurred in the Moscow Patriarchate since 1924 and the establishment of the Metropolitan District here, which would now vitiate or impair the declaration of autonomy then validly made.

In the light of the evidence and the realities of the case, it must be held that the Moscow Patriarchate now exists solely by sufferance of the Soviet Government, that it is subject to civil direction and ultimate control by the Soviet, and that, during this period of domination, to permit the

Patriarchate to exercise jurisdiction over the St. Nicholas Cathedral would involve an impermissible perversion of the implied trust to which it was dedicated.

If Sergei's acts as Patriarch may be considered equivocal with respect to his relationship with the Soviet, there is no doubt or vacillation in the policies of his successor, Alexei. The best that can be said is that they have preserved the bare existence of the Russian Orthodox Church in Russia and what is called "freedom of cult", i.e., of liturgical observance. This may be no mean accomplishment but it is a far cry from the kind of existence which would permit resumption of administrative control over the Metropolitan District. Plaintiff's leading witness, a church historian, concluded that "the fact remains that the Russian Church is subjugated by the state and exploited as a tool for the latter's far ranging policies", a characterization which the Trial Judge himself adopted, as we shall see.

Patriarch Alexei has always appeared to be an ardent supporter of the Soviet State. He was an outspoken admirer of Stalin, whom he addressed as the "God-appointed leader" and to whom he pledged unswerving loyalty. The proceedings of the 1945 sobor which elected him read more like a Communist party rally than the solemn conclave of a major religious faith. He and his official publications have warmly supported the standard Communist "line" on various political matters. At appointed times, he and the church have sponsored or supported "Peace Conferences" extolling Russia and condemning the West. The journals of the Moscow Patriarchate, which have on occasions been excluded from the United States mails on the ground of constituting political propaganda, are replete with virulent and intemperate attacks upon the Government, people, and policies of the United States. Every area of political conflict between the United States and Russia becomes the subject of another tirade, more vicious and more effective for the very reason that it appears in a church publication, under ecclesiastical sanction, and couched in phrases borrowed from the religious lexicon.

Thus, the United States has been castigated as the "fornicatrix of the resurrected Babylon", "the Washington Cain", "the beast of the Apocalypse" and "the contemporary blood-thirsty Baal". All the base lies of Soviet propaganda regarding alleged American germ warfare and mass rape in Korea to imperialist and warmongering designs in the Middle East are duly and faithfully parrotted. "The great blasphemy from the Christian point of view", according to the Moscow Patriarchate, "is the fact that these [American] people call themselves Christians."

At the trial, there was evidence that "freedom of religion" in the present Soviet Constitution means merely freedom of "cult" or of ritual observance on a parish basis, there being a prohibition against any religious preaching, charitable activity, instruction or training of the young or other "propaganda". On the other hand, the Soviet Constitution guarantees freedom of antireligious propaganda.

There is also evidence of the Soviet policies with respect to religious bodies as illustrated by the actions suppressing the Catholic church in Hungary. There, it was shown, the Communists caused the imprisonment and persecution of the clergy, the confiscation of church properties, the requirement of loyalty oaths, and the interpretation of remaining church offices and institutions by Communist party representatives who assumed to themselves the powers of decision formerly exercised by bishops and other clerics.

A Russian expert called by plaintiff, based upon his knowledge of the Soviet State, a visit to Russia and his belief that the Soviet Union is a totalitarian society, testified he felt that the conclusion flows that "as significant an institution as a major church must be very closely watched and supervised by the Soviet State and that the Soviet State would not permit any such significant institution to operate freely, with all the possible consequences

that such free operation might raise for the totalitarian state."

Likewise, the Moscow Patriarchate has embarked upon an aggressive program to establish hegemony over all the other autocephalous Orthodox Churches of the Eastern Confession. There was an ancient Russian ambition to become the inheritor and repository of the Christian tradition and the true center and leader of Christendom. The idea was based upon the notion that both Rome and Constantinople had possessed and then forfeited the mantle of leadership which should thus pass to Russia. The theory embodying the claim was known as "Moscow-the-Third-Rome", *and there is evidence that Patriarch Alexei, subserving the aims and purposes of the Soviet foreign policy,* has become its great modern exponent. Thus, the Moscow Patriarchate has derided the traditional title of the Patriarch of Constantinople as the "Ecumenical" Patriarch and has sought to orient all the other Orthodox churches to Moscow instead. Through visits to their countries, through co-operation of the political officials in the satellite Nations of eastern Europe, through subsidies furnished by the Soviet Government and through infiltration and pressure, the Moscow Patriarchate is making its influance felt throughout the Orthodox world.

Since World War II, the Moscow Patriarchate in its official publication, the *Journal of Moscow Patriarchate*, and in other forms, has periodically published and disseminated in Russia and throughout the world, including the United States, the pronouncements of its top hierarchs, including Patriarch Alexei and Metropolitan Nicholai, which have followed and supported the Soviet line in international affairs, and have been denunciatory and defamatory of the United States Government and its people and of the allies of the United States.

The Executive Department of the United States Government has on occasions excluded from the mails and the customs various issues of the *Journal of the Moscow Patri-*

archy on the ground that they constitute political propaganda in accordance with the opinion of the Attorney General of the United States of December 10, 1949.

The State Department of the United States has refused to permit Archbishop Boris Vik, the current appointee of the Moscow Patriarchate, to enter the United States to perform his functions.

Finally, the record is replete with instances of political diatribes issued by the Patriarchate in furtherance of the interests of the Soviet State, many of them delivered by Metropolitan Nicholai, second in power to Alexei and considered his probable successor. While it is not and cannot be in any way dispositive of this appeal, being dehors the record, it may not be amiss at this point to note that, in testimony on May 5, 1959 before the Internal Security Subcommittee of the Judiciary Committee of the United States Senate, Peter S. Deriabian, a former officer of the NKVD, later known as the Ministry of State Security of the Soviet Government, stated that most of the priests of the church in Russia were agents of the secret police, that the seminarians were systematically recruited for this service, and that Metropolitan Nicholai himself is such an agent of the State security apparatus.

Against the foregoing, defendants brought out on cross-examination that, as a matter of history, various "loyalty" oaths had been required by political leaders of bishops in various countries, that the Soviet Government had never attempted to alter the *dogma* of the church, and that Soviet *law* does not require that clergymen be approved by the State. These witnesses, however, stated that the Soviet State does interfere in the internal administration of the church and that it had "committed the Russian Church to a policy of unconditional fealty and blind support in exchange for precarious recognition". Defendants also put on three clergymen affiliated with the Moscow Patriarchate who testified that they had visited Russia, stayed there for a short period, observed churches open, in good physi-

cal condition, well attended on occasion and religious articles for sale. One witness also stated that no one had suggested that he should make any commitments to the Soviet Government.

With respect to such evidence, attempted comparisons between the present case and historical instances of church-State relationships in other lands and other times are not determinative of the problem. The situation presented here, created as it was by the Communist revolution, finds no exact parallel in history. Likewise, accounts of apparent religious activity in Russia may show that the church retains existence there but this does not go to the ultimate issue of its domination by the State.

On the whole record, we conclude that the Moscow Patriarchate enjoys at best a nominal and conditional existence, at the sufferance of the Communist rulers of the Soviet State, that the Patriarchate is subject and subordinate to the Soviet Government and required to work for the furtherance of its political aims and objectives in Russia and abroad and that the administration of the church is in the hands of individuals who, through coercion, through employment or through conviction, subserve the paramount interests of the State. On this central issue, we are constrained to disregard any contrary findings of the Trial Justice and as a matter of law act in accordance with the facts as clearly and incontrovertibly demonstrated.

Actually, the Trial Justice himself conceded that the question as to the domination of the Patriarch by the Kremlin had to be found in favor of plaintiff by repeated comment that this condition of subservience now is no worse than that which existed prior to the Communist revolution and under the Czars. Thus, he stated that "The Russian Church as a tool exploited by the State was no new phenomenon." That fact being conceded, he then went on to excuse the condition by adding: "'But so it was under the Tsars'." He dismissed the Patriarchate's political ex-

pressions and activities in support of the Soviet State as "fulminations of an individual"; yet at another point he commented that analysis of the testimony of one of plaintiff's expert witnesses "reveals no greater, or even as great, a subservience of the church in Russia to the central government as had been acknowledged under the Czarist regimes."

No other view is possible than that the Russian church is administered as an agency of the Soviet State and we are sure that even our dissenting brethren will agree that no court which sits in judgment on this case can be so naive as to disbelieve, any more than did the trial court, by its own statements, the strong proof that the Patriarch is subservient to the Communist dictatorship in the U. S. S. R. If it be conceded, as it thus is, that the Moscow Patriarchate is subservient to the Soviet State and is a tool exploited by the Communist rulers, it is impossible to excuse that condition on the ground that the former Czar of Russia employed the church as an instrumentality to effectuate the objectives and policies of his government. Common sense tells us that there is an essential and distinguishing difference between the two situations. The Czar did not persecute and harass the church. On the contrary he was a member of the church, a believer of its doctrines, a supporter of its activities and the major source of its revenues. The present Soviet Government is frankly and grossly anti-religious. It attempted to destroy the church and only tolerates it now because it can be useful.

Moreover, the North American Diocese was founded and composed of immigrants from Russia to whom the concept of a divinely appointed Czar was natural and indigenous. There was no incongruity or incompatibility in his close, active and interested participation in the administration of the church and in the corresponding reverence and loyalty accorded him by the faithful. But it passes understanding that anyone can rationally substitute the present atheistic Communist rulers of the Soviet for the

Czar of Russia in this picture of church-State relations and conclude that there is no difference between the two. The Czar was sworn to uphold the church; the Communists are committed to its ultimate destruction. There is an obvious distinction between the civil head of an established or State church sworn to support it, and the appointed agent of the State security system posing as a cleric to effectuate the policies of the State including the ultimate elimination of the very church he subverts.

By reason of this radical change in the nature and operation of the former central church authority in Moscow, the rule of *Watson* v. *Jones* (*supra*) is not applicable with respect to properties of the North American Diocese. As we stated in 306 N. Y. at pages 49-51, and particularly at page 51, there is a basic qualification to the application of such rule. The court must always be careful to ascertain whether the central church authority really exists or enjoys sufficient freedom of action to be able to function as such. The rule may not be applied when it would result in a perversion of the trust to which local church properties were dedicated when, as here, the highest church authority has departed, in a broad, fundamental and substantial manner from the customary organization, operation and doctrine of the church. "In other words, where a *property right* turns upon a decision of the church authority, the civil court is under a duty, if such issue is raised, to ascertain whether the purported authority is duly constituted and functioning." (306 N. Y., p. 51.)

The described status and situation of the church in Russia has persisted, without essential change, from the period following the Bolshevik revolution down to the present time. It provided the factual basis for the American declaration of autonomy in 1924 and it provides the factual basis for the continued autonomous administration of the church here with right of local election of bishops.

Under those circumstances, the archbishop elected by the Metropolitan District as representative of those for

whom the property was originally dedicated and as the trustee " 'who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust' " (306 N. Y., pp. 52-53) is entitled to the use and occupancy of St. Nicholas Cathedral. To hold otherwise, at least as long as the present picture persists of Patriarchal domination and interpenetration by hostile and antireligious civil authorities, and to award the cathedral to an appointee of the Moscow Patriarchate, under present conditions, would involve a violation of the constitutional protection against State interference in the free exercise of religion. As stated in the *Trutza* case (205 F. 2d 107, 112, *supra*): "Since this is true as to protection against the interference of an individual American state, we think it should be equally true as to protection against the domination and interference of a foreign state."

The First Amendment would nullify identification of a church with the Government of the United States or of a State. We do not understand on what principle it is supposed to sanctify the identification of a church with a foreign State. An act of the Legislature was considered to be necessary in the beginning to permit the incorporation here of Russian churches at the instance of the envoy extraordinary and minister plenipotentiary of Russia to the United States and the Consul General here (L. 1871, ch. 12; Stokes, Church and State in the United States, Vol. 3, p. 359). There can hardly be a constitutional mandate requiring that foreign States shall be allowed to administer churches in the United States. The extent of the establishment of a church by a foreign government having this result may be a matter of degree, but where the identification is as complete as it is held to be in this case, we think that the First Amendment forbids a new foreign government to take over the administration of existing church property here in the interest of its own temporal power and against the wishes of the members of the church here. Even if this be not so, the First Amendment does not stand in the way of the judi-

cial requirement under the principles of equitable jurisdiction that the *property* of a religious society shall be administered according to the purposes to which it has been dedicated. Every naturalized citizen of the United States is required to take an oath of allegiance whereby he expressly renounces and abjures all allegiance to any foreign prince, potentate or power. Native citizens are bound to the same renunciation. Can this solemn obligation be circumvented if the foreign power operates in this country through a branch of the State bearing the name of a church—even the name of a church that is old and respected? With all but unanimity the members of that church in this country have said no. It would be strange if our fundamental law, while ordering the separation of church and State, were so awkward an instrument that in functioning it has to produce an opposite result from that at which it aims.

One final word may be said. Our decision does not involve interference with the right of any religious organization to select or appoint its clergy. No one disputes that the Patriarchate as now constituted may appoint and dispatch an archbishop here to minister to those in this country who may still acknowledge the administrative rule of the Patriarch of Moscow. No one disputes that such an archbishop may establish and maintain churches here under the full protection of our constitutional guarantees of freedom of religion. What we do hold is that the appointees of the Patriarchate, by virtue of its radically changed status since 1918, may not assume control of property in this State, such as St. Nicholas Cathedral, which is dedicated to the use of the former North American Diocese and, now, the Metropolitan District.

Moreover, we do not consider our decision to be in conflict with the *Kedroff* decision of the Supreme Court (*supra*). As the Court of Appeals stated in the *Trutza* case (205 F. 2d supra, p. 110): "Here no ordinance, statute or congressional enactment is involved. This is not a case of legislation claimed to be violative of the First

Amendment to the Constitution of the United States. It is a controversy between the American and Canadian church group and the Communistic government in Romania working through the hierarchy."

The judgments appealed from should be reversed and judgment directed for plaintiff, with costs.

DESMOND, J. (dissenting). Three limitations on this court's power forbid reversal of this judgment. First, our State Constitution (art. VI, § 7) denies to us any jurisdiction to review affirmed findings of fact; second, the United States Constitution's First and Fourteenth Amendments makes unlawful (*Watson v. Jones*, 13 Wall. [80 U. S.] 679) any interference by a State court with the internal affairs of a religious body; and, third, the United States Supreme Court in this very lawsuit (344 U. S. 94) has forbidden such interference by the New York courts with the appointment of this archbishop to this diocese of this cathedral by this Patriarch of Moscow. No one of these restrictions is considered in the majority opinion. Bound as I am by each of them, I vote to affirm.

This is a suit in ejectment brought to decide the right of occupancy of the Russian Orthodox Cathedral in New York City. Each of two trials has resulted in findings and adjudications, affirmed by the Appellate Division on each occasion (276 App. Div. 309; 6 A D 2d 866), that the archbishop consecrated by the Patriarch was entitled as such to possession of this See church of the American archdiocese. This court reversed the first of those judgments (302 N. Y. 1) but the United States Supreme Court reversed us (by a vote of 8 to 1) on grounds which will be quoted in a later part of this opinion. After and despite the Supreme Court's reversal, this court ordered a new trial. The issues of fact framed by us were then tried. Evidence was taken on both sides. Again, findings of fact were made in favor of defendants and again there was an affirmance by the Appellate Division of those findings and of that judgment. At that point our court under our State Constitution (art.

VI, ¶ 7) had no further jurisdiction over the case, since the fact question which we had sent for trial (and which we had described as the only issue left in the case) had been, by the trial and Appellate Division affirmance, finally and forever settled in favor of the Patriarch's appointee. Nonetheless, we granted leave to appeal to this court and are now reversing the judgment below because, as the majority opinion says, "we are constrained to disregard any contrary findings of [fact]". There can be found no other decision in this court wherein we have taken to ourselves power to disregard affirmed findings of fact made on a resolution of a question of fact.

On the second appeal to this court we stated that the issue for trial and "the determinative issue in the case" was "whether there exists in Moscow at the present time a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body". We had said exactly the same thing on the first appeal here (see 302 N. Y. 1, 22, *supra*; 306 N. Y. 38, 46) and the United States Supreme Court (344 U. S. 94, 106, *supra*) had quoted our language as stating the question of fact which our court thought should be tried. Our order for a new trial did not specify the triable issue but the Trial Justice, of course, took these expressions from the opinions as being a mandate. He went ahead and tried the stated issue and, on conflicting proofs, decided it. He did not construe our opinions as licensing a choice by the New York courts between the Patriarch's appointee and the priest chosen by the schismatic "Metropolitan District". (Rejection by our courts of the Patriarch's nominee for the archbishopric is the same kind of interference with religion of which we accuse the Soviet authorities.)

The Trial Justice, proceeding to the trial of the only issue discernible, took lengthy testimony from both sides on the question of whether, as of the date of the trial, "the Patriarchate of Moscow is the head of a functioning religious order". After examining the opposing proofs he

made a finding that the Patriarchate does so exist and does so function. Any other finding would be somewhat startling since the Patriarchate is recognized throughout the religious world (including recognition by the Vatican and by the World Council of Churches and by plaintiff itself) as being the *de facto* and *de jure* head of the world-wide Russian Orthodox Church.

The other two obstacles to a reversal here are pointed out in the holding of the United States Supreme Court that the power to appoint this archbishop is and always has been in the Patriarch. To quote (344 U. S. 94, 120-121, *supra*):

"The record before us shows no schism over faith or doctrine between the Russian Church in America and the Russian Orthodox Church. It shows administrative control of the North American Diocese by the Supreme Church Authority of the Russian Orthodox Church, including the appointment of the ruling hierarch in North America from the foundation of the diocese until the Russian Revolution. We find nothing that indicates a relinquishment of this power by the Russian Orthodox Church.

"Ours is a government which by the 'law of its being' allows no statute, state or national, that prohibits the free exercise of religion. There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property. Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. This under our Constitution necessarily follows in order that there may be free exercise of religion."

Near the end of our court's majority opinion on the present appeal, it is said that we are not interfering with the Patriarch's right to select his clergy or appoint his archbishop but that any archbishop appointed by him may not occupy St. Nicholas Cathedral which, says the majority opinion, is "dedicated" to the use of the Metropolitan District, that is, the schismatic group represented by plain-

tiff. Of course, there is no proof of any such dedication. Like every other cathedral, this edifice is by dedication and by definition an Episcopal church—the archbishop's church—and, since the Patriarch's century-old power to appoint bishops to his church's dioceses is undisputed, the cathedral can never be dedicated by anyone to any other use or trust. Its only dedication was in 1905 and no civil government can rededicate it. This idea of a dedication to plaintiff's use (time, place and manner of dedication unexplained) is new in this case. If there had been any such dedication there would have been no reason for a new trial and nothing to try. The fact issue we ordered tried—that is, whether the Patriarchate is functioning in Russia as the ruling body of the Orthodox church—would have been quite immaterial if the right to use the New York cathedral had already passed, by some unexplained dedication, out of the Patriarch's control and into that of plaintiff.

No Judge of this court is unaware of the professed atheism of communism or of the antireligious bias and activities of the Communist rulers of the U. S. S. R. Each of us as an individual deplores and abhors the cruel attacks of the Communist regime on religious institutions and on their clergy and communicants. But we sit here as a court deciding a lawsuit. The same jurisdictional and substantive rules control in this case as in every other one we hear. There are no exceptions for lawsuits against Communists. Neither the basic American constitutional prohibition against government interference in intro-denominational affairs nor our State Constitution's jurisdictional controls exclude a case where a Communist-oriented or Communist-dominated Patriarch appoints a Communist sympathizer as archbishop.

The judgment should be affirmed, with costs.

Judges Dye, Froessel and Van Voorhis concur with Chief Judge Conway; Judge Desmond dissents in an opinion in which Judges Fuld and Burke concur.

Judgment reversed, with costs in all courts and judgment directed for plaintiff.

Appendix B

Opinion of Court of Appeals of the State of New York

CONWAY, *J.*:

The decision of this Court in *St. Nicholas Cathedral* v. *Kedroff*, 302 N. Y. 1, directing judgment in favor of the plaintiff, i. e., the group known as the "Russian Church in America," has been reversed by the Supreme Court of the United States in a majority opinion written by Mr. Justice Reed, and the case has been remanded to this Court "for such further action as it deems proper and not in contravention of this opinion" (344 U. S. 94). On the basis of such reversal and remand, the defendants-respondents, i. e., the appointees of the Moscow Patriarchate, now move, in substance, for an order directing final judgment in their favor. Adjudication of the motion requires a re-examination of the grounds and rationale of our decision and the extent to which it has been affected by the action of the Supreme Court.

The majority opinion in this Court very clearly divided consideration of the case under two heads—one statutory and the other common law. It was held that error, in any event, had been committed below, and that, under common law principles, a new trial would be required, but that, under the statute, which was deemed controlling, final judgment for plaintiff was mandatory. Amendment of the remittitur was granted to make clear that the ultimate basis for the decision was the statute and that a contention that such statute was unconstitutional had been rejected. Thereupon the Supreme Court entertained the case and eventually, in an opinion, decided that the statute, as construed and applied by this Court, did indeed constitute a violation of the constitutional right to the free exercise of religion, and accordingly, as above noted, returned the matter to us for such further action as we might deem proper and not in contravention of the said opinion. With

the statutory phase of the case thus authoritatively eliminated, we are left with the alternative common law base, which still stands as the basis for future action.

The foregoing is a simplified summary of what we conceive to be the present status of the case. We shall now discuss these views in more detail.

The prevailing opinion in this Court, reported in 302 N. Y. at pages 1 to 33, contains an extended review of the origins of this controversy—the history of the Russian Orthodox Church, the founding of the North American diocese, and the consecration of St. Nicholas Cathedral as the See, the Bolshevik revolution, the persecution, suppression and virtual extinction of the Church in Rusisa by the Soviet Government (pp. 4-9), the patriarchal ukase of 1920 authorizing Diocesan Bishops to assume full hierarchal power in the event of cessation of the highest church Administration in Moscow, subject to confirmation by such authority upon its re-establishment (p. 7), the prior litigations here (pp. 10-15), the renewed activity of the Moscow Patriarchate and the Sobor of 1945 (p. 17), the unsuccessful efforts at reconciliation (pp. 17-18), and the commencement of this action (pp. 19-21).

For over twenty years prior to the commencement of this action, St. Nicholas Cathedral—the historical and traditional See of the Russian Orthodox Church in North America—had been occupied by John S. Kedrovsky and his family (302 N. Y. at pp. 4, 12, 16). Kedrovsky was not a cleric of the Russian Orthodox Church, but rather of the short-lived "Renovated" or "Living Church", which had been created and supported by the communists in Russia as a divisive influence in the campaign against religion after the Bolshevik revolution, and which purported to assume control of the Church abroad. Everyone now admits and agrees that this "Renovated Church" was uncanonical and had no standing whatever. Nevertheless, by judgment of the Appellate Division in 1925 (214 App. Div. 483), affirmed by this Court without opinion in 1926 (*Kedrovsky*

v. *Rojdestvensky*, 242 N. Y. 547), Kedrovsky wrested possession of the Cathedral from Archbishop Platon, the true head of the North American Diocese who had been appointed as such by Patriarch Tikhon. That decision, incidentally, was supported on the ground that the occupant of the Cathedral must be an appointee of the central church authorities in Russia and that Kedrovsky, not Platon, was the current appointee of the authorities then existing, viz., the "Renovated Church". This, we think, is an illustration of the difficulty in applying a mechanical test in such a situation without full examination and proof as to the nature of the so-called "central church authorities". The courts, perhaps, were then too close in point of time to realize what had really occurred in Russia and they did not have access to the facts now available. In retrospect, however, and with the knowledge born of aftersight, it is now apparent that, by virtue of that decision, the rightful occupant was ousted from the Cathedral and its administration and possession turned over to a schismatic whose sect actually became extinct after a few years as is admitted by both parties herein.

Faced with this usurpation of the authority of the original patriarchal central church, and with the Diocese in chaos and confusion, threatened with the loss of its temporalities to schismatics such as Kedrovsky, Archbishop Platon convened an American Sobor and the administrative autonomy of the new North American Metropolitan District was declared (302 N. Y. at pp. 11-12). This action was taken in pursuance of Patriarch Tikhon's Ukase No. 362 of 1920, a remarkably prescient document, which contained instructions for diocesan bishops in case the activity of the highest church administration should stop and in case the cessation of activity should acquire "a protracted or even permanent character". In that event, the diocesan bishop was officially empowered to "organize the diocesan administration suitable to conditions created", with the proviso

that "all measures taken locally in accordance with the present instructions * * * must be submitted for confirmation later to the Central Church Authority when it is established" (302 N. Y. at p. 7). The American Sobor, in establishing the Metropolitan District, stated that the "final regulation" of the status of the North American Church was to be left to a "future Sobor of the Russian Orthodox Church which will be legally convoked, legally elected, will sit with the participation of representatives of the American Church under conditions of political freedom, * * * and will be recognized by the entire Oecumenical Orthodox Church as a true Sobor of the Russian Orthodox Church" (302 N. Y. at p. 12).

Two years after our affirmance in the *Cathedral* case, *supra*, we declined to follow such decision to its logical conclusion. In *Kedrovsky* v. *Russian Catholic Church*, 249 N. Y. 75, we reversed a judgment which had directed Platon and the others in the Metropolitan District to turn over to Kedrovsky all the properties and deeds of the new Metropolitan District. Realizing that the legitimate claims of the new Metropolitan District, whose temporary administrative autonomy had but recently been declared, were entitled to consideration, and "in view of the dissensions that have arisen", we returned the case to our Supreme Court, leaving it to that Court, after full consideration of the facts, and in the exercise of its discretionary power, to achieve a result whereby the faithful of the Russian Orthodox Church in this country might continue to enjoy their accustomed religious temporalities under the supervision of trustees who might "be relied upon to carry out more effectively and faithfully the purposes of this religious trust."

Finally, the autonomous status of the Metropolitan District, based upon the above-described Ukase of 1920, was expressly sustained in *Waipa* v. *Kushwara*, 259 App. Div. 843, motion for leave to appeal denied, 283 N. Y. 780.

The instant action was commenced by the plaintiff corporation, St. Nicholas Cathedral of the Russian Orthodox Church in North America, as the holder of the record title to the Cathedral premises. The corporation was created in 1925 by special act of the Legislature, and was composed of Platon and others of the Metropolitan District. It is now controlled by and represents Archbishop Leonty, the successor, on December 1, 1950, who was elected Platon's successor as head of the Metropolitan District. While the corporation continued to hold title to the Cathedral down through the years, the Cathedral itself was occupied by Kedrovsky (by virtue of the aforesaid judgment in 242 N. Y. 547 which we disregarded in 249 N. Y. 75) until his death in 1934, and the Metropolitan District was *enjoined* from interfering with such possession. Kedrovsky's son, Nicholas, remained in and occupied the Cathedral from 1934 until 1944, when he too died, at which time possession of the Cathedral passed informally to his brother, John Kedroff, whose only status was that of a priest in the concededly extinct "Renovated Church."

Meanwhile, following a period of several years during which the central or Patriarchal church had virtually ceased to exist, one Sergius made a compact with the Soviet government and was appointed acting *locum tenens* of the patriarchal throne in 1927 (302 N. Y. at p. 15). Sergius, in 1934, appointed Benjamin as "permanent ruling Bishop of the Russian North American Diocese", *the order reciting* that Benjamin had "organized in New York a Diocesan Council and that our North American Diocese had *begun* official existence (302 N. Y. at pp. 15-16). During all the period from his appointment in *1934* for the purpose of forming such *new* diocese down to the commencement of the instant action in *1945*, it does not appear that Benjamin asserted any claim to occupancy of the Cathedral or took any action to recover possession of it, which conduct may be said to constitute a practical interpretation of his authority as contained in his appointment in forming a new or different Diocesan Council and North American Diocese.

The present action is in ejectment and was commenced in 1945, as above stated, against John Kedroff, the second son of John S. Kedrovsky, the said Kedroff having taken possession of the Cathedral informally on the death of his father and brother *without benefit of appointment by anyone*. It being quite obvious that Kedroff, on these facts, would not have been able to retain possession of the Cathedral as against the claim of plaintiff and of Theophilus, the Bishop of the Metropolitan District, and indeed could not put in any defense, he (Kedroff) *after the commencement of this action* requested reordination as a priest by Benjamin in the latter's new diocese (302 N. Y. at p. 20). Following his re-ordination by Benjamin in the latter's new diocese, Kedroff purported to "give" the Cathedral to Benjamin who was then permitted to intervene in this action (302 N. Y. at pp. 20-21). Benjamin then occupied the Cathedral from October, 1945, until June 6, 1947, when, in order to obtain an adjournment of this action, *he agreed to give up possession of the Cathedral* (302 N. Y. at p. 21). At the time of trial, Benjamin was living at 38 Halsey Street in Brooklyn.

In our opinion we also took note of the general common law principle developed in the American Courts and notably expressed in *Watson* v. *Jones*, 13 Wall (U. S.) 679, 724-727, and in our own case of *Trustees of Presbytery of N. Y.* v. *Westminister Presbyt. Church*, 222 N. Y. 305, 315 and our statute, Religious Corporations Law, Sections 4, 5, that in a central or denominational church, the decision of the highest church judicatories will be accepted as final and conclusive by the civil courts. Mention was made on page 21, of the controlling effect we were subsequently to ascribe to the new Article 5-C of the Religious Corporations Law, and then we stated (pp. 21-2):

> "Quite apart from this legislative action with respect to a specific dispute here involved, we think

that, as a matter of common law as intimated by our 1928 decision in *Kedrovsky* v. *Russian Catholic Church* (249 N. Y. 75, *supra*), there was ample basis and room for an exercise of the discretionary power of the Supreme Court over the conduct of trustees, in favor of the North American metropolitan district. We think that in the light of historical facts and the evidence in the records that the leaders of the North American metropolitan district are the trustees 'who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust' i.e., who may administer the temporalities of St. Nicholas Cathedral for the benefit of the faithful for whose use it was originally dedicated.

"The courts below, in granting judgment herein to defendants did not determine, in the exercise of their discretion whether defendants could be relied upon to carry out faithfully and effectively the purposes of the religious trust. The *Westminister* and *Watson* cases (*supra*) were cited and the conclusion drawn that St. Nicholas Cathedral must be occupied by an archbishop appointed by the central authorities in Moscow and that Benjamin, who was so appointed, was therefore entitled to the possession of the Cathedral. This, we think, was error. The determinative issue in the case, apart from the action of the Legislature with respect to the problem, was whether there exists in Moscow at the present time a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body. If the Moscow patriarchal throne has been resurrected by the Soviet Government solely as a means of influencing opinion at home and abroad, and if it may now be operated on an international scale, not as a true religious body, but only as an extension or implementation of Russian foreign policy, then it is clear that the North American metropolitan district and not the appointee or ambassador of the central authorities in Moscow, is the proper trustee to manage for the benefit of the faithful in this hemisphere those religious temporalities dedicated to the use of the Rus-

sian Orthodox Mission and Diocese prior to 1924 when it became an administratively autonomous metropolitan district."

And later removing any possibility of ambiguity as to our thoughts on this branch of the case, we said:

> "In short, we think that further inquiry might well have been made into the present status of the patriarchate in Russia and we think the Supreme Court should have determined, in the exercise of its discretion, whether Benjamin, the appointee of the central church authorities in Moscow, or Metropolitan Theophilus, the archbishop of the North American Metropolitan District, was the proper person to administer the temporalities of St. Nicholas Cathedral and whether he was the proper trustee 'who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier*, 226 N. Y. 114)'. (*Kedrovsky* v. *Russian Catholic Church*, 249 N. Y. 75, 77-78, *supra*). That was not done because it was thought that the cases of *Watson* v. *Jones* (13 Wall. U. S. 679, *supra*), and *Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church* (222 N. Y. 305, *supra*) required a decision in favor of defendants and that the earlier case of *Kedrovsky* v. *Rojdesvensky* (242 N. Y. 547, *supra*), was determinative of some phases of the problem. Our views on this aspect of the controversy would require reversal and the ordering of a new trial so that the Supreme Court might exercise its discretion along the lines herein indicated. It is unnecessary, however, to discuss that further, for there is another ground requiring reversal here and judgment in favor of plaintiff and the North American metropolitan district which it represents."

Thus, in so many words, we announced that, in the absence of the statute, we would order a new trial at which findings might be made and discretion exercised, concerning the existence and status of the central church authorities in Moscow and their ability to carry out effectively and faithfully the purposes of the religious trust.

Although the prevailing, concurring and dissenting opinions in this Court adverted in detail to the constitutional arguments presented in connection with the statutory branch of the case, it was necessary for defendant to request amendment of the remittitur to make it clear that such constitutional question had been necessarily determined. We were careful in amending the remittitur to limit the constitutional objections solely to the statutory phase of the case. Thus, we said (302 N. Y. at p. 690):

> "* * * Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz., whether Article 5-C of the Religious Corporations Law, as construed by this court, violated any rights of the defendant guaranteed by the First and the Fourteenth Amendments to the Constitution of the United States. This court held that the aforesaid statute did not violate any of the rights of the defendants guaranteed by those Amendments to the Constitution of the United States."

After argument and submission of the case, the Supreme Court ordered reargument and specifically requested counsel to include a discussion of whether the judgment might be sustained on state grounds (343 U. S. 972). It was only after both parties concluded that it could not be so sustained (because it depended upon the constitutionality of the statute) that the Supreme Court considered the constitutional issue on the merits. Thus the court said (344 U. S. 94, 97):

> "Because of the constitutional questions thus generally involved, we noted probable jurisdiction, and, after argument and submission of the case last term, ordered reargument and requested counsel to include a discussion of whether the judgment might be sustained on state grounds (343 U. S. 972). Both parties concluded that it could not, and the unequivocal

> remittitur of the New York Court of Appeals, 302 N. Y. 689, specifically stating the constitutionality of the statute as the necessary ground for decision, compels this view and precludes any doubt as to the propriety of our determination of the constitutional issue on the merits. *Grayson* v. *Harris*, 267 U. S. 352; *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95. The case now has been reargued and submitted."

We mention this because it makes clear that the only basis for the appeal to the Supreme Court of the United States was our conclusion that the statute had controlling effect and that it was not unconstitutional.

Mr. Justice Reed, delivering the opinion of the Court, made express mention of our alternative, non-legislative basis for decision. He pointed out that we had considered "whether there exists in Moscow at the present time a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international body" and he noted that we had "concluded that this aspect of the controversy had not been sufficiently developed to justify a judgment upon that ground. 302 N. Y. at pp. 22-24." (344 U. S. at p. 106.)

He then proceeded upon the *assumption* that the pre-revolutionary authority and paramount jurisdiction of the Moscow Patriarchate over the American Church has continued without change and without interruption down to the present day. In the light of this assumption, Justice Reed then considered the narrow question of the legislative power of New York to enact Article 5-C of the Religious Corporations Law, as that statute was construed by us. His opinion throughout refers to this *legislative* aspect of the controversy. Thus, he says that our determination "was made on the authority of Article 5-C" (p. 97), that "Article 5-C is challenged as invalid" (p. 100), that this court "depended for its judgment • • • upon Article 5-C" (p. 106) and he concluded for the Supreme Court that "we think the statute here in question passes the constitutional

limits." (p. 107), that "Such a law violates the Fourteenth Amendment" (p. 107); and that it constituted "a transfer by statute of control over churches" (p. 110). Later, in the concluding and determinative portion of the opinion entitled "Legislative Power", he rejected our conclusion as to "legislative power over religious organizations" (p. 118), he distinguished the *Douds* case (339 U. S. 382) (pp. 118, 119) and repeatedly returned to the theme that the statute in question, Article 5-C, was beyond the legislative power of the State of New York and violated the Constitution rule against prohibition of the free exercise of religion (pp. 120, 121).

Thus, we feel that the Supreme Court, in its decision, did *not* determine the constitutional validity of the alternative common law disposition of the case previously announced by this Court, viz., that, apart from the statute, a new trial would be ordered so that our State Supreme Court, under proper instructions, might ascertain all the facts of the controversy and render appropriate findings and exercise of discretion thereon.

Accordingly, we adhere to our prior decision, apart from the statute, to order a new trial upon the issues here involved. Since we have previously, publicly and categorically expressed our considered conclusion that such action would be required in the absence of the statute, and since the statute has been expunged from the case, it would be unreasonable to take a different position now, unless we were compelled to do so by the action of the Supreme Court. We have already shown that the actual decision of that Court relates solely and exclusively to the constitutional validity of Article 5-C and does not, in terms, affect our conclusions of the non-statutory aspect of the controversy. Mr. Justice Reed, however, did include in his opinion an extended discussion (pp. 110-116) of the case of *Watson* v. *Jones*, 13 Wall. 679, which introduced into the law of America the principle that in a central, denominational or hierarchal church, the decision of the highest

church authority or tribunal, will be accepted as final and conclusive by the civil courts. He conceded that the principle, as announced, was not a constitutional pronouncement, and could not have been (p. 115). He continued with the comment that (p. 116):

> "* * * The opinion radiates, however, a spirit of freedom for religious organizations, an independence from secular control of manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. *Freedom to select the clergy, where no improper methods of choice are proven,* we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference."

It can hardly be said that this passing comment, unnecessary to the actual decision of the court upon the validity of Article 5-C, has the effect of elevating the rule of *Watson* v. *Jones* to the dignity of a constitutional mandate binding upon all the courts of the land. There is no indication that the Supreme Court, by its decision herein, intended to make a pronouncement of such major proportions.

Nevertheless, whether *Watson* v. *Jones* be viewed as a common law or constitutional rule, there is still some area in which the civil courts can and must operate in controversies submitted for adjudication. Justice Reed himself implied as much with his qualification that the rule is operative only "where no improper methods of choice are proven" in the selection of the clergy, of whom, of course, Benjamin is one.

Whatever other limitations have been or will be placed upon the rule of *Watson* v. *Jones*, there is one basic qualification to its application. That is that the highest church authority or tribunal, whose decision is to be accorded final and conclusive effect, must in truth and fact be capable of functioning freely with its activities directed by churchmen in the interests of the church and in accordance with

the organic law of the church. In other words, where a *property right* turns upon a decision of the church authority, the civil court is under a duty, if such issue is raised, to ascertain whether the purported authority is duly constituted and functioning. The court is not required, without investigation and in unquestioning obedience to a legal formula, to give conclusive effect to the determinations of any group which purports to exercise authority, particularly as against the contention that the claimed authority is being subverted to secular and irreligious ends.

In the instant case as we noted in our original opinion (p. 22): "We know that a nominal church organization exists in Russia but that is not enough", in view of the position steadfastly maintained by the plaintiff that the central church authority "has been absorbed by the Russian Government and its actions deprived, during the period of such denomination, of any religious significance" (p. 24). To reject the claim of the plaintiff in this regard, without hearing and weighing all the evidence, would be grossly unjust and would constitute an infringement of their right to free exercise of religion. Uncritical acceptance of the principle of *Watson* v. *Jones, supra,* without qualification, as to "improper methods of choice" of clergy (p. 116) under the circumstances here involved, does not advance the end of religious liberty but rather retards it, for in effect the court would be requiring the communicants of the Metropolitan District to acknowledge the administrative rule of persons whom they believe are mere puppets of a monolithic and atheistic secular power, if such communicants wish to continue to use the religious temporalities they have so long enjoyed.

With respect to the new trial now to be had, there can be no doubt that the plaintiff *corporation* which holds *title to the Cathedral premises* is entitled to *possession* thereof. Likewise, we think, there can be no doubt that the trustees of the corporation, who are now members of the North American Metropolitan District, are charged with the duty

of caring for and maintaining the property. There is also no doubt that the said trustees must administer these temporalities in accordance with and subject to the "denominational" usage whatever that may be held to be, and for the beneficiaries for whom the trust was originally created.

Section 5 of the Religious Corporations Law provides that the "trustees of every religious corporation shall have the custody and control of all the temporalities and property, real and personal, belonging to the corporation and of the revenues therefrom, and shall administer the same in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject * * *."

For the purpose of the case at bar, the question of the proper administration of the Cathedral trust by the trustees of the plaintiff corporation comes down to which of two clerics—Leonty or Benjamin—is to be put into possession of the edifice.

A line of cases in this Court supports the proposition that the civil courts of this State have jurisdiction in equity to inquire into and determine whether trustees of a religious corporation owning realty are properly administering the real property in accordance with the terms of the trust.

We stated in *Westminster Church* v. *Presbytery of New York*, 211 N. Y. 214, 224-5:

> "Upon the trial of the action the plaintiff proved all the facts necessary to make out a prima facie case in ejectment. It proved title, possession and ouster by the defendant. * * * The plaintiff having legal title to the property was entitled to the possession thereof so far as appeared from any evidence properly in the record. If, as the defendant asserts, the trustees of the plaintiff corporation are not administering the property in accordance with denominational usage, the Presbytery [defendant] as an adequate remedy in equity to compel them to do so * * *."

This principle of civil jurisdiction to review the administration of religious trusts was mentioned again in *Trustees*

of Presbytery v. *Westminster Church*, 222 N. Y. 304, 318; and again, in the above-noted case of *Kedrovsky* v. *Russian Catholic Church*, 249 N. Y. 75, 77-8, a prior litigation affecting the Cathedral and similar issues. In the latter case, we stated (pp. 77-78):

> "In view of the dissensions that have arisen, the Supreme Court may well conclude that the title should be vested in some other trustee who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (Carrier v. Carrier, 226 N. Y. 114)."

In the case at bar, it appears obvious that the Cathedral was dedicated for the use and benefit of the faithful in the old North American Diocese of the Russian Orthodox Church. Prior to the death of Patriarch Tikhon, the last Patriarch who had unquestionable authority in every respect, the proper administration of the trust demanded that the trustees permit the Cathedral to be occupied and governed by the appointee of the Patriarch. But, in view of the undeniable break in the Patriarchal succession and the virtual extinction of the Patriarchate after the Bolshevik revolution, in view of the Patriarchate Ukase of 1920, the circumstances under which it was issued and the creation of the North American Metropolitan District in reliance thereon, in view of the strong probability that the Patriarchate, though nominally re-established, cannot function except as an arm or agent of anti-religious civil government, in view of what appears to be the overwhelming adherence of the faithful in America to the clergy of the Metropolitan District rather than to the new diocese organized by Benjamin; in view of all this, it is incumbent upon the courts of this State to move cautiously and carefully in this difficult field, to gather all the evidence possible, to entertain the views of expert church scholars, to analyze the available documents and the canon law, to make findings of fact and to exercise sound discretion thereon, building

up a record which is suitable for intelligent review and adjudication by the appellate courts.

The action of the Court, based upon appearances rather than facts which were then difficult to ascertain, and based upon a conventional legal formula uncritically accepted without re-appraisal in the light of special circumstances, resulted in a judgment in 1926 which led to the occupancy of the Cathedral for over twenty years by persons who had no right to be there, *a fact which is now conceded by both parties.* It would be most unfortunate if this Court, with so graphic a warning at hand, permitted such a mistake to occur again.

Moreover, since the public policy of the State of New York with respect to this controversy was so strongly pronounced in 1945 and 1948, there is some obligation, we think upon the Courts of this State to attempt, if at all possible within the framework of legal rules, statutes and the Constitution, to finally adjudicate in our state courts the question posed by this litigation so that we may determine them under state decisional law as the United States Supreme Court hoped could be done when it ordered reargument and which it was prevented from doing because of our "unequivocal remittitur" which had been amended at the request of the defendants so as to enable them to test out in the Supreme Court the constitutionality of our state statute as distinguished from our state decisional law (302 N. Y. 689).

In this connection, as bearing upon our settled public policy in passing the legislation of 1945 and 1948, and as confirmation of the interpretation which the majority of this Court placed upon such legislation, we note the letter of Governor Thomas E. Dewey, dated December 22, 1950, to Archbishop Leonty of the North American Metropolitan District, which appears in plaintiff's brief in the Supreme Court of the United States but which was not submitted to us on the appeal here. In that letter, Governor Dewey stated (Appellee's brief, pp. 105-6):

"I have your gracious telegram conveying greetings from the Eighth All American Sobor of Russian Orthodox Greek Catholic Church of North America. I was happy to be able to sign the Acts of the New York State Legislature in 1945 and 1948 which confirmed the members of the Russian Orthodox Greek Catholic Church in the possession of Saint Nicholas Cathedral in New York City, thus freeing it from the evil and sacrilegious influence of representatives of the Soviet.

"I join you in looking forward to the time when all worshippers of the Orthodox Greek Church in the world will be free from the clutches of the Soviet Government.

"Sincerely yours,

THOMAS E. DEWEY".

The motion to amend the remittitur is granted to the extent that a new trial is ordered and the case is remitted to the Supreme Court, New York County, for trial in accordance with the views herein expressed.

DESMOND, *J.*, (dissenting)

We dissent. Our authority is the clear, positive and binding pronouncement, by the United States Supreme Court, in its opinion in this very case, of the law of this identical controversy (*Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94). The sole question in the litigation was, and is, this: Can intervening defendant Fedchenkoff, holder of an admittedly valid appointment by the Patriarch of Moscow, world head of the Russian Orthodox Church, as archbishop of the North American Diocese, be prevented by the State of New York from occupying as his see church the Arch-diocesan Cathedral in New York City? The [illegible] when the case was here before (302 N. [illegible], barred the Archbishop from the Cath[illegible] decreed possession thereof to the Rus[illegible]ch in America, a separatist movement. The [illegible]'s reliance for that holding was on

Article 5-C of the New York Religious Corporations Law, judicially construed as transferring the Cathedral from control by the Mother Church in Russia, to control by the "American Church", on a supposed legislative determination that the Moscow Patriarchate was a mere instrumentality of the Communist regime in the U. S. S. R., and so incapable of carrying out the religious trust. But the United States Supreme Court, reaffirming *Watson* v. *Jones*, 13 Wall. 679, held flatly that the Watson rule gave constitutional protection, under the First Amendment, to the selection of clergy by hierarchs (see *Gonzales* v. *Archbishop*, 280 U. S. 1).

The *Watson* v. *Jones* formulation of a fundamental American doctrine of religious freedom (old in New York, see *Connit* v. *Reformed Church*, 54 N. Y. 551) is simply this: that, as to a subordinate body of a general church organization, the civil courts must accept, as finally binding, the decisions of the Supreme Judicatory of the general organization in all matters of discipline or belief, or ecclesiastical custom or law. Since, said the Supreme Court in its opinion in our case, the Russian Orthodox Church is hierarchial in government, the power to appoint, and the choice of, its archbishops is a matter of ecclesiastical government, as is the right of that appointee, as such, to occupy the Cathedral. Therefore, the question sought to be litigated in this suit was one with which the Civil courts had nothing whatever to do. Any State interference with such choice of a prelate, of such occupancy, would be violative of freedom of religion, under the Federal Constitution. The Supreme Court, therefore, reversing the lower New York courts, sent the case back to us for further proceeding "not in contravention of" the Supreme Court's opinion. Since the sole purpose of the suit was to obtain an adjudication, contrary to that of the Orthodox Church's highest judicatory, on a pure question of ecclesiastical

government and discipline, the only possible consistent course, for this court to take, after that reversal, was to order the complaint dismissed. Instead, action most inconsistent is being ordered, in the form of a trial as to the motivations of the Patriarch of Moscow, and as to the qualifications of Archbishop Fedchenkoff. The ordering or holding of such a trial, or any determination the[re] either way, on either of the two questions, has been [pre]empted in advance, we say, by the Supreme Court, as an [un]constitutional intrusion by the State of New York in[to] the inner affairs of a church. Actually, the interfere[nce] in this, its second form, is more to be condemned t[han] was the first attempt. Our first decision here was b[ased] on a New York statute and, perhaps, there was som[e] ity in the New York courts to try to salvage that s[tat]e. Yet, now that the statute has been stricken do[wn] as unconstitutional, we are licensing a trial in a c[ivil] court to find a fact which, if found, could be n[o] basis for any constitutionally valid judgment.

If unc[on]stitutionality under the First Amendment were not [pl]ain here, we would state more fully the impropriety, [as] a matter of New York practice, of ordering a new trial, on this record. Here, we are told, there are two fact issues to be tried: as to the domination of the Patriarch by the Kremlin, and as to the fitness of his archiepiscopal appointee. But, at the first trial, plaintiff frankly conceded in open court that it could never hope to prove the "domination" by common law evidence, and asked, instead, that judicial notice be taken. After this court gave plaintiff judgment on an assumption that the Legislature had acted on knowledge of that supposed fact of Patriarchal subjection to the Communists, the United States Supreme Court said that, even if such were the fact, State action based thereon could not be valid, in an ecclesiastical matter. So, the trial we are ordering, insofar as it concerns the workings of the Patriarch's mind and the purity of his motives,

is unjustified by the record, and, by concession, foreordained to futility. As to any question of the fitness of the intervening defendant for the archbishopric, no such contention was made at the first trial.

Pressed on us now as some sort of authority for this new trial order are *Kedrovsky* v. *Paton*, 242 N. Y. 547, and *Kedrovsky* v. *Russian Church*, 249 N. Y. 75. If either of those decisions deny the right of the Patriarch of Moscow to appoint the archbishop of New York, then they were overruled on November 25, 1952 (344 U. S. 94). The long and short of it is that the order which this court now hands down violates not only the Supreme Court's mandate, and the First Amendment, but long and thoroughly settled New York law (*Jarvis* v. *Hathaway*, 1808, 3 Johns Rep. 178; *Dieffendorf* v. *Reformed Church*, 1822, 20 Johns Rep. 12; *Dutch Church* v. *Bradford*, 1826, 8 Cow. 457; *Connit* v. *Reformed Church*, 1874, 54 N. Y. 551). And those old cases of ours were in the direct line of descent from fundamental American thought much older than the Constitution itself (*vide*, Roger Williams in the seventeenth century: "The government of the civil Magistrate extendeth no further than over the bodies and goods of their subjects, not over their soules, and therefore they may not undertake to give Lawes unto the soles and consciences of men" quoted in Rossiter's Seedtime of the Republic, 1953; p. 197).

The complaint should be dismissed.

Motion to amend the remittitur granted to the extent that a new trial is ordered and matter remitted to the Supreme Court, New York County, for trial in accordance with the opinion herein.

Opinion by Conway, J. All concur except Desmond, J. who dissents in an opinion in which Fuld, J. concurs. Van Voorhis, J. taking no part.

Appendix C

ORDER OF REVERSAL

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 30th day of December in the year of our Lord one thousand nine hundred and fifty-nine, before the Judges of said Court.

Witness,

THE HON. ALBERT CONWAY, *Chief Judge*, presiding.
RAYMOND J. CANNON, Clerk.

Remittitur December 30, 1959.

No. 132

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA,

Appellant,

vs.

WASSIL A. KRESHIK, as Dean of Saint Nicholas Cathedral, & ors., &c.,

Respondents.

BE IT REMEMBERED, That on the 13th day of April in the year of our Lord one thousand nine hundred and fifty-nine, Saint Nicholas Cathedral of the Russian Orthodox Church of North America, the appellant in the cause, came here unto the Court of Appeals, by Ralph Montgomery Arkush, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Wassil A. Kreshik, as Dean of Saint Nicholas Cathedral, & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Philip Adler, their attorney,

Order of Reversal

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Charles H. Tuttle, of counsel for the appellant, and by Mr. Philip Adler, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, with costs in all courts, and judgment directed for the plaintiff.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be reversed, with costs &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, Clerk's Office,
Albany, December 30, 1959.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

RAYMOND J. CANNON,
Clerk.

Appendix D

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix E

(Unidentified numbers in parentheses refer to pages of the printed record used in the State Court. Page references to the record used in this Court on the first appeal are preceded by the letters "U.S.").

The Russian Orthodox Church

The Russian Church is hierarchal in its form of government and prior to 1918 its Supreme Authority was vested in a body known as the Holy or Sacred Synod and after 1918 in a Patriarch who, in turn, is elected by sobors or general conventions of the Church (U. S. pp. 10-11, 163). The Sobor of 1917-18 abolished the Holy Synod and elected Tikhon Patriarch (pp. 203-4).

Under the Czars the Church was "part and parcel", a "department" of the regime, was a "tool", an "agency" of the state (180-6, 193-5, 198-9)[1] to an extent far greater than that postulated (in our opinion erroneously) by the majority under the Soviets. Yet, says the majority, the bishops appointed by the Czars were properly honored in their canonical rights, but the bishop appointed by the Patriarch should not be.

After the revolution there was a struggle between the Soviets and Patriarch Tikhon, which resulted in his temporary imprisonment and brought to the fore a divisive group called the "Living Church", which, in the words of respondent's witness, Dr. Spinka, was not "wholly wrong" (pp. 237-41). However, Tikhon, on his release from prison, in a manifesto, issued July 15, 1923, recalled any prior delegation of temporary authority, declared that "we once again invest ourselves with our Primate's authority" resumed "full direction" of the affairs of the Church, which he exercised until his death in April of 1925 (pp. 246-9,

[1]The full story is told in Spinka, *The Church and the Russian Revolution*, pp. 1-63.

1424-9).[2] The Living Church died out in a few years (pp. 237-8, 242; U. S. p. 164).

Following Tikhon's death Sergius in 1926-7 became Locum Tenens and from that time until his death in 1944, he was acknowledged by the Orthodox world as the canonical head of the Russian Church (pp. 256-7, 301-2, 308-9).[3]

At the last Sobor held in 1945, which was attended by Patriarchs, Bishops and other representatives of the Orthodox World (pp. 310-11, 730-2, 1455) and which Justice Reed said was "admittedly canonical" (344 U. S. at 104), the present Patriarch was elected by due process of canon law. At that Sobor the Patriarchate adopted a constitution which provides a complete framework of government of the Church on a parish, diocesan and Sobor level (pp. 492, 1436-1445).

The canonical validity of this Sobor and the Patriarch's election is not questioned and he was commemorated, as required by canon law, in the prayers of the local churches as the Head of the Russian Church (pp. 823-4, 1483-4; U. S. pp. 18, 31). In 1946 the metropolitan district, in convention assembled, resolved that "His Beatitude Alexy, Patriarch of Moscow and All Russia, be requested to continue us in his fold and be our spiritual head" on terms of autonomy (pp. 1181-3); that same year the metropolitan

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[2] The claim of the majority that by 1924 the Patriarchate had "ceased to exist" (p. 3a, 10a, *supra*), is contradicted by this manifesto which they fail to mention.

[3] The majority refer to Sergius' demand in 1926-7 for a "pledge of loyalty" by the clergy to the Soviets, but omit to state that this meant no more than that they should not engage in political agitation "Both in Church and in the name of the Church" (U. S. pp. 122-3, 113-14), that this conformed to Christian tradition (pp. 545-8, 280-3, 286, 287-8, 295) and that Sergius emphasized the "contradictions" between the Church and communism (p. 1159). The Patriarch's proposals for autonomy in 1947 eliminated all questions of "loyalty" (pp. 1448-55).

district taught, in its official catechism, that "The Russian Orthodox Church is subordinate to the Most Holy Patriarch of Russia and to his Synod" (p. 839); and in 1952 the district declared that it has accepted and will accept as canonical only those ordinations which are recognized as Orthodox by the Patriarch (pp. 846-7, 1488-9).

The Patriarch is in full communion with all Eastern Churches (pp. 311-12), and in 1948 they celebrated with him at a Pan-Orthodox Conference the 500th anniversary of the Autocephaly of the Russian Church where the envoy of the Patriarch of Constantinople and others spoke in terms of praise of the Russian Church and affection for Patriarch Alexi (pp. 312-15).

In 1954 the Anglican Church (pp. 316-17), and in 1956 the National Council of Churches of Christ in this country, exchanged with the Patriarchate delegations of bishops, clergy and laymen and discussed problems of mutual interest (pp. 317-20).

Patriarch Alexi is universally acknowledged as the canonical Head of the Russian Church, as, in the words of Justice Frankfurter, "the legitimately chosen holder of his office" (344 U. S. at 125).

The majority omit all mention of the foregoing facts and say merely that Alexi was elected Patriarch at the Sobor of 1945. Such omissions, and the others mentioned later, hardly qualify the majority opinion as an impartial statement of the facts.

The American Archdiocese

The American Archdiocese was founded by the Holy Synod at the end of the eighteenth century, was from the beginning a constituent part of the Church at large and was at first governed directly by the Holy Synod and then by the bishops appointed by it (actually by the czar) and, after

1918, by the Patriarch (U. S. pp. 11-13, 15-17, 21, 164). The bishops of the diocese were never elected (U. S. pp. 12, 20, 26, 135). Since the Russian Church is apostolic and catholic, that is, universal, and not an aggregate of independent units, a diocese or parish may not, without consent of higher authority, secede or be autonomous, and if they attempt to do so, they cease to be canonical and cut themselves off from the Church and Orthodoxy (pp. 928-9, 165, 21) and all rights to its property (*Watson* v. *Jones*).

Saint Nicholas Cathedral

This Cathedral was built about 1899-1903 by order of and under the close supervision (pp. 1514-15) of the Holy Synod with money supplied by it and the Russian government, amounting to about $140,000.00 (pp. 1518-9, 1534-5)[4] and they contributed further substantial sums for its maintenance and upkeep (pp. 1548-9). The Cathedral was designed, in the words of the authorizing documents, to be "appropriate to the dignity of the Russian Church and Empire" and was to serve as a "shelter for His Grace the bishop" (p. 1540).

The right of the appointed Archbishop under the canon law of the Russian Church, as an attribute of his Episcopal office, to occupy and use Saint Nicholas Cathedral as his residence, as a place of worship, and as the seat of his government of the Archdiocese, has never been questioned (U. S. 16-17, 164-5, 136). Even the majority acknowledge as much (p. 10a, *infra*).

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[4] Nominal "title" was taken in the name of a corporation of which the Russian ambassador and consul general were the sole trustees (U. S. pp. 229-30). However, management and control of the Cathedral, including the temporalities thereof, were in the hands of the bishop, subject to the "superior control" of the Holy Synod (U. S. p. 233).

Petitioner Bishop Boris is the accredited Archbishop by virtue of his appointment to that office by the Patriarch (pp. 1456-8); petitioner Dionsius is his substitute by like appointment (p. 1582); and they are entitled to the use of the Cathedral unless a civil court may constitutionally deny them this canonical right.

The Metropolitan District

In 1924 a group of Russian churches met at a convention in Detroit and declared themselves "temporarily" to be a self-governed Church, governed by its own elected archbishop and thereafter styled themselves as an "administratively autonomous metropolitan district" (p. U. S. 186-8).[5]

In 1936, the district subjected itself to the supreme authority of a Synod of Bishops, domiciled in Karlovitz, Yugoslavia, called the Karlovitz Synod or the "Russian Church Abroad", which purported to act as a rival to the Patriarchal Church outside Russia. Th district pledged "loyalty" to this Synod of Bishops which first sought the restoration of the Czar, then joined its fortunes to those of Hitler and, with the liberation of Yugoslavia, followed him back to Germany. The district continued under the authority of this Synod while Hitler was in control of Yugoslavia (pp. 216-220, 232, 235, U. S. p. 32-4, 109-111, 143-5, 244-6). At its convention in 1946 the membership of the district withdrew from the organization (pp. 232, 1181-2)

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[5] The district was organized to escape, not from the Patriarch, as the majority claim (p. 3a, *supra*), but as the trial court found (p. 50) from Kedrovsky, the local representative of the Living Church. "We all stand for the Patriarch" said one speaker at the Detroit convention (U. S. p. 186). Plaintiff's Constitution of 1925 refers to Platon as ruling bishop by virtue of his "appointment" by the Patriarch and not by virtue of his "election" by the district (U. S. p. 174).

and "resolved that His Beatitude Alexy, Patriarch of Moscow and all Russia, be requested to continue us in his fold and be our Spiritual Head" on terms of autonomy (pp. 1181-3).[6]

The Patriarch at all times took the position that the organization of the metropolitan district and the actions of its leaders violated the canons, rules and usages of the Russian Orthodox Church and are "null and void" (pp. 1171, 250, 538-9, U. S. p. 165), and placed its elected leaders under suspension (pp. 1477-82, 1485-8).[7] Like rulings were made outlawing the Karlovitz Synod from the very beginning (pp. 223, 233; U. S. p. 110, 140-1, 166).

Following this 1946 resolution, negotiations between the Patriarchate and the metropolitan district for re-union were resumed (p. 1178-81), and Metropolitan Gregory, the Patriarch's envoy, came to this country in 1947 and offered the district autonomy on purely canonical terms which were to conform to our laws (p. 1448-55, 1452). These terms

[6] The experts of the district submitted a memorandum to the convention (U. S. p. 242-7) wherein they acknowledged the canonical infirmity of the district (U. S. p. 243-4), that the Patriarchate "has in no way digressed from the dogmas, canons, or the rites of Orthodoxy" (U. S. p. 244, 246), and that its "adherence to a political line, for which it is often criticized today, cannot be the deciding influence concerning its canonical status" (U. S. p. 246), which they said was no impediment to the "canonical subordination of our Church to the Moscow Patriarchate" (U. S. pp. 245-6), a course which they recommended.

[7] The autonomy cannot be justified, as the majority claim, by the order of 1920 (p. 4a, 10a, *supra*). Three witnesses testified that this order was withdrawn (pp. 220-1, U. S. 142, 166). Tikhon's manifesto of July, 1923, and his appointment in September, 1923, of Platon as bishop of the diocese proves this. With this order before him, Justice Reed held that the Patriarch did not relinquish his authority over the diocese or recognize the autonomy of the district (344 U. S. at 105-6). The order required confirmation by the Patriarch of any action thereunder (p. 1152) and the autonomy was condemned.

eliminated all questions of "loyalty" or "abstention" from criticism of the Soviets (which thus became academic), and acceded to the request of the district that confirmation of its elected bishops be withheld by the Patriarch only on canonical grounds (p. 1453). The district can have all the autonomy it wants provided it fulfills the 1946 resolution of the membership for reunion with the Patriarchate.

The majority are wholly silent about the Karlovitz episode, the resolution of 1946 for reunion and Gregory's proposals, which we believe are decisive against their claims.

Basic to the position of the majority is their unjustified claim that the metropolitan district is "now" the diocese (p. 11a, 25a, *supra*). They disregarded the fact that about 80 out of a total of 180-190 churches did not atend the Detroit convention and did not approve its resolutions (pp. 944-7). In 1946 four bishops and their parishes and, in 1947, two bishops and a priest left the district (pp. 922, 953). The Patriarchate has about 50 parishes adhering to it (p. 741). The number under the Karlovitz Synod is unknown. The metropolitan district constitutes only a seceding group of churches, fluctuating in number which is grossly exaggerated (p. 726), a mere splinter of the diocese.

The present status of the Patriarchate

The Soviets succeeded in liquidating all other ancient institutions but in the Orthodox Church they found an indestructible force and so, beginning about 1938, a fundamental, in the words of Dr. Spinka, a "very radical change" (pp. 138, 304-6), came over the attitude of the Soviet government toward the Church and there began and continued "increasingly" to the present time (p. 306), what Professor Timasheff of Fordham University, in his book of that name, calls "*The Great Retreat*"—a retreat, that is, by the Soviet government and not by the Church. Dr. Gsovski acknowl-

edged that "numerous concessions" had been made by the Soviets to the Church (p. 482) and that "the Church has to be reckoned with as *independent* social force which is not going to disappear in the foreseeable future despite adverse conditions created by the Soviet government" (p. 482, italics added).

The situation today is this: Church and state are officially separated. The Patriarch is elected by sobors, not appointed by the state. Bishops are appointed by the Patriarch and not by the state. No prior approval by the state is necessary for their appointment and they make no pledge of loyalty to the state (pp. 299, 495-6, 554-5) which was the case under the czars and was and is now the case in other countries (pp. 294, 295-6, 297-8; Ehler and Morall, *"Church and State Through the Centuries"*, an authoritative study, shows many instances of "domination" of the Church by the State (pp. 298, 246-49, 244, 249-54, 12, 13-15, 96-100, 227, 291-5).

There are today in the Soviet Union about 80 dioceses, 80 bishops, about 25,000 parish priests and 25,000 parish churches and over 3,000 chapels. Convents and about 90 monasteries are in operation and the burden of taxation has been lifted from them or otherwise alleviated (pp. 337-8).

There are two theological academies and 8 seminaries (p. 340) and the courses of instruction are in the highest Orthodox tradition and the demand for entrance in these institutions exceeds their capacity (pp. 746, 749-50, 858-9, 860, 1471-5). Curtiss (*The Russian Church and the Soviet State*) says that there is today "a marked expansion of Orthodox theological education" (p. 308) and that the Church has received "a marked rejuvenation" (p. 306).

The Church receives no money from the State but makes its living solely from the faithful (pp. 496, 533, 496-7, 533, 552). The Church has a factory for the manufacture of

tapers, icons and cresses, which it sells to the faithful. It also has a printing plant where it prints its journal and religious books and, more recently, the Church printed 50,000 copies of the Bible (pp. 753-63). The vestments of the clergy are of the finest quality and the services have lost nothing of their traditional splendor (pp. 746, 854, 858). The faithful respond to the message of the Church with fervor and they shower it with—in the words of Harrison Salisbury—a "blizzard of ruble notes" (N.Y. Times, Sept. 12, 1959, p. 2)—which are collected in bushel baskets which farmers use to collect produce (pp. 746-7).

The Soviets do not interfere in the internal affairs of the Church (pp. 304-5, 493-5, 552-4, U. S. p. 167). Baptisms, religious marriages, funerals and other sacraments are freely administered (pp. 337-42, 531-5, 497-8, 532-3). Worship is free and ample opportunities and facilities—churches, cathedrals and monasteries—are now available for its extensive exercise. There has been no change in doctrine or ritual (pp. 494-5, 502, U. S. p. 246). The Church has in all things obeyed its organic law (U. S. p. 102).

In view of the foregoing we must consider as unsupported or contradicted by evidence, as arbitrary and partisan, the claims of the majority that by 1924 the Patriarchate had "ceased to exist", that this "described status" is the same today without "essential change", that the autonomy was and is valid, despite the Patriarchs' rulings to the contrary, that the metropolitan district has the right to elect its bishops without confirmation by the Patriarch,[8] that the Patriarchate has departed from the customary organization and "doctrine" of the Church, that

[8]The canon law provides that where a bishop may be elected locally, "his election shall be submitted to the confirmation of the Supreme Church Authority" (U. S. p. 20, 26). Such confirmation is indispensable to apostolic succession (U. S. pp. 26-7, 136). A civil court has no power to rule that bishops may be elected without prior authority or subsequent confirmation.

its actions have been deprived of "any religious significance", that it has only a "nominal" or "bare" existance, that it does not have the "kind"[9] of existence to "qualify" it as a "trustee" or "permit" its control of the Cathedral and that it is "dominated" by the Soviets.[10]

Furthermore, the majority refer to the attacks on the United States (which we rightly resent) by writers in the Patriarchal Journal (p. 19a, *supra*), but they omit to state that the first 85 pages of the 150 pages of these excerpts from the Journal (pp. 516-17, 523) were submitted by respondent to this Court on the first appeal (See pp. 118-152 of its brief, and pp. 50-80 of its supplemental brief). They also refer to the fact that Bishop Boris' visa was cancelled by our State Department, but omit to state the circumstances thereof, i.e., our attempt to obtain reciprocity for an American priest in the Soviet Union (pp. 1199-1202, 1576-7) and that Bishop Boris did receive a visa in November, 1958. Indeed the bishop is now in this country and resides at the Cathedral. They refer also to the fact that "on occasions" the Patriarchal Journals had been withheld from customs and mail delivery by the "Executive Department" because they allegedly contained "political propaganda", but omit to state that this action was taken by the Postal authorities and was based on an undisclosed opinion of their solicitor (we have no way of knowing whether he was right or not), and that since 1955 no copies of the Journal have been withheld from customs or mail delivery (p. 916). There is no basis for respondents' claim made below that the Cathedral was or is used for propaganda (pp. 915-16).

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[9]What is the "kind" of existence which would "permit" control of the Cathedral by the Patriarchate? Are each of the 50 states to answer? And does not the answer involve deep intrusion into the internal affairs of the Church?

[10]Dr. Spinka acknowledged that Patriarch Alexy's actions and policies were "voluntary" (p. 171) and that a highly favorable view of his actions may be taken (p. 329-335).